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IN THE

Supreme Court of the United States

October Term, 1969

No. 915

THE NEW YORK, NEW HAVEN and HARTFORD RAILROAD COMPANY-FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE,
Appellant,

against

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the Southern District of New York

JURISDICTIONAL STATEMENT

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December 5, 1969

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JURISDICTIONAL STATEMENT

The New York, New Haven and Hartford Railroad Company First Mortgage 4% Bondholders Committee (Bondholders Committee) appeals from the decree of the three-judge United States District Court for the Southern District of New York (Statutory District Court) entered on September 11, 1969,* modifying, and sustaining as modified, the Fourth Supplemental Report and order of the

* Appeals are also being docketed by Manufacturers Hanover Trust Company, as Trustee of the First and Refunding Mortgage and The Chase Manhattan Bank, N.A., as Trustee under the General Income Mortgage.

Interstate Commerce Commission (Commission) dated November 25, 1968 (Remand Report), which report incorporates and adopts, except where expressly modified, the Second Supplemental Report of the Commission dated November 16, 1967 (Inclusion Report).* The Remand Report, as now modified by the Statutory District Court, purports to establish the price that the Penn Central Company (Penn Central) is required to pay to The New York, New Haven and Hartford Railroad Company (New Haven) for the assets of the New Haven transferred to Penn Central on December 31, 1968. The transaction is one of the consequences of the approval of the merger of Penn and Central. See *Penn-Central Merger and N & W Inclusion Cases*, 389 U.S. 486 (1968).

The New Haven is and has been a Debtor in reorganization under Section 77 of the Bankruptcy Act in the United States District Court for the District of Connecticut since July 7, 1961. As a result, proceedings essentially parallel and related to the Statutory District Court proceedings have taken place in the United States District Court for the District of Connecticut (Reorganization Court). The New Haven reorganization proceedings have been assigned for all purposes to United States Circuit Judge Robert P. Anderson since their inception.**

The Bondholders Committee respectfully submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

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* The Inclusion Report and its accompanying orders were earlier remanded to the Commission by the Statutory District Court and the Reorganization Court. See *N.Y., N.H. & H.R.R. Bondholders Committee* v. *United States*, 289 F.Supp. 418 (S.D.N.Y. 1968) and *In re New York, N.H. & H.R.R.*, 289 F.Supp. 451 (D. Conn. 1968).

** Judge Anderson was a United States District Judge in 1961, when the section 77 petition was filed. He became a United States Circuit Judge in 1964 but he has retained jurisdiction over the proceedings by designation of the Court of Appeals for the Second Circuit.

Opinions Below

The Statutory District Court for the Southern District of New York issued its opinion in this case on June 18, 1969. The opinion is not yet reported and has been reprinted at pages 400a-443a to the Joint Appendix* filed herewith. The opinion was supplemented by a memorandum dated September 11, 1969, which memorandum is not reported and has been reprinted at pages 444a-445a to the Joint Appendix. The final decree, dated September 11, 1969 has been reprinted at pages 446a-452a to the Joint Appendix.

The related proceedings in the Reorganization Court in respect of the Commission's Remand Report were the subject of unreported opinions dated May 28, 1969 and July 28, 1969 and orders dated May 28, July 1 and July 28, 1969. The opinions have been reprinted at pages 277a-306a and pages 312a-315a and the orders have been reprinted at pages 307a-308a, pages 309a-311a and pages 312a-315a.**

Earlier opinions in this case and related proceedings are set forth below:

I. *United States Supreme Court:*

Penn-Central Merger and N & W Inclusion Cases, 389 U.S. 486 (Jan. 15, 1968)

* References to pages of the various opinions, orders and decrees reprinted in the Joint Appendix will be identified by reference to "Jt. App. p. ——". The Joint Appendix is entitled "New Haven Terms of Sale and Inclusion Cases".

** The Bondholders Committee has appealed from these orders. Simultaneously with the filing of this Jurisdictional Statement, the Bondholders Committee will file a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review this case before judgment is issued in that court.

II. *Reorganization Court:*

(a) *In re New York, N.H. & H.R.R.*, 281 F. Supp. 65 (D. Conn. Feb. 13, 1968) (Jt. App. p. 229a)

(b) *In re New York, N.H. & H.R.R.*, 289 F. Supp. 451 (D. Conn. Aug. 10, 1968) (Jt. App. p. 237a)

(c) *In re New York, N.H. & H.R.R.*, unreported, (D. Conn. Dec. 24, 1968) (Jt. App. p. 263a)

III. *Statutory District Court?*

(a) *New York, N.H. & H.R.R. Bondholders Committee v. United States*, 289 F. Supp. 418 (S.D.N.Y. July 10, 1968) (Jt. App. p. 323a)

(b) *New York, N.H. & H.R.R. Bondholders Committee v. United States*, unreported (S.D.N.Y. Aug. 5, 1968) (Jt. App. p. 384a)

IV. *Interstate Commerce Commission:*

(a) *New Haven Railroad—Discontinuance of Passenger Trains*, 327 I.C.C. 151 (Apr. 5, 1966)

(b) *Pennsylvania R.R.—N.Y. Central R.R.—Merger*, 327 I.C.C. 475 (Apr. 6, 1966) (Penn Central Merger Report)

(c) *Pennsylvania R.R.—N.Y. Central R.R.—Merger; Second Supplemental Report*, 331 I.C.C. 643 (Nov. 16, 1967) (Inclusion Report) (Jt. App. p. 1a)

(d) *Pennsylvania R.R.—N.Y. Central R.R.—Merger; Fourth Supplemental Report*, 334 I.C.C. 25 (Nov. 25, 1968) (Remand Report) (Jt. App. p. 112a)

(e) *Pennsylvania R.R.—N.Y. Central R.R.—Merger; Fifth Supplemental Report On Reconsideration,* 334 I.C.C. 528 (July 10, 1969 as modified Aug. 26, 1969)* (Jt. App. p. 222a)

Jurisdiction

This action was instituted on December 31, 1968 pursuant to Title 28, U.S.C. §§1336, 1398, 2284 and 2321-2325, to annul, enjoin and set aside the Commission's Fourth Supplemental Report and accompanying order except insofar as that order directed Penn Central to acquire substantially all of the assets and operations of the New Haven no later than December 31, 1968 and to pay the consideration required by the Fourth Supplemental Report.** By order dated January 10, 1969, this action was consolidated with the three related actions. On June 18, 1969, the Statutory District Court, by Circuit Judge Henry J. Friendly and District Judge Richard H. Levet, filed its opinion and District Judge Edward Weinfeld filed an

* The Fifth Supplemental Report on Reconsideration dated July 10, 1969 was issued *ex parte* and on the Commission's "own motion" (334 I.C.C. at 529) subsequent to the opinions of the Reorganization Court and the Statutory District Court. Neither Court remanded any issues in respect of the price and no hearings were held by the Commission or argument or papers submitted by any party. The issuance of the July 10, 1969 report triggered a petition by Penn Central for reconsideration and a subsequent submission of briefs by the parties. The Commission, on reconsideration, modified its report and re-issued the report as modified on August 26, 1969. The Fifth Supplemental Report appears to have been issued solely in response to the request of the Statutory District Court for the submission of a proposed decree (Jt. App. p. 431a). The Statutory District Court's decree recites that it was "advised" by the Fifth Supplemental Report (Jt. App. p. 447a).

** The Commission order required the transfer of assets and operations regardless of pending litigation over the price to be paid. The Reorganization Court ordered the conveyance and payment "without prejudice to the right of any party to contest the fairness and adequacy of the considerations * * *." (Order No. 559, Dec. 24, 1968, Jt. App. p. 275a.)

opinion dissenting in part. The Statutory District Court issued its decree dated and entered September 11, 1969 modifying and sustaining as modified, the Commission's Fourth Supplemental Report. Notice of appeal was filed in the District Court for the Southern District of New York by the Bondholders Committee on October 9, 1969.

The jurisdiction of the Supreme Court to review the decree of the Statutory District Court by direct appeal is conferred by Title 28, U.S.C. §1253.

Statutes Involved

The statutes involved in this case are: Fifth Amendment to the Constitution of the United States; Administrative Procedure Act, §§10(a), 10(c), 10(e), 5 U.S.C. §§702, 704, 706; Interstate Commerce Act, §§ 1(18), 1(20), 5(2), 49 U.S.C. §§1(18), 1(20), 5(2); Bankruptcy Act §§77(b), 77(e), 77(g), 77(o), 11 U.S.C. §§205(b), 205(e), 205(g), 205(o). The text of these statutes is reprinted in the Joint Appendix and the Appendix to this jurisdictional statement.

Questions Presented

Since the Statutory District Court and the Reorganization Court are in agreement with each other that the Constitution of the United States, Section 5(2) of the Interstate Commerce Act and Section 77 of the Bankruptcy Act require a minimum purchase price and since both courts have determined that the price found by each *is* the minimum purchase price permitted by the Constitution and the statutes, any error by either of the courts which results in the failure to give the minimum value results in the fixing of an unlawful price. The Commission has ordered the transfer of the New Haven assets on the basis of a purchase price which it considers to be the lowest price permissible

under the Constitution of the United States, which price it considers to be identical to the lowest price permissible under Section 5(2) of the Interstate Commerce Act and Section 77 of the Bankruptcy Act. As a result, virtually all the questions involved in this appeal are questions which test the boundaries of the Constitution, the boundaries of two important statutes and the boundaries of the Commission's power.

1. Where the Reorganization Court and the Commission in the name of the public interest have required, for seven and one-half years, the erosion of over $60 million of the bondholders' security with the knowledge that the New Haven could not be reorganized as an operating railroad because its income could not equal its operating expenses, does liquidation value without compensation for the erosion work an unconstitutional taking of the bondholders' property?

2. Have Penn and Central, by their merger with knowledge that a condition of such merger requires payment of a price fair and equitable to the New Haven, perforce accepted to pay an amount equal to liquidation value plus the New Haven's losses resulting from the Commission's and the Reorganization Court's requirement that operations of the New Haven continue until those operations are assumed by Penn Central?

3. Has the Commission violated the Fifth Amendment to the Constitution of the United States, Section 5(2) of the Interstate Commerce Act or Section 77 of the Bankruptcy Act in requiring the transfer of the New Haven assets to Penn Central for a price less than the fair market price that could be achieved upon liquidation sales?

4. Has the Statutory District Court erred in concluding that the Commission's powers to issue and condition certificates for abandonment under Sections 1(18) and

1(20) of the Interstate Commerce Act in the circumstances of this case permit it to project a requirement for lengthy administrative proceedings which would set back the receipt of liquidation proceeds for one year and to discount the fair market value of the assets on account of the hypothetical delay?

5. Has the Statutory District Court erred in concluding that the Commission's powers to issue and condition certificates for abandonment under Sections 1(18) and 1(20) of the Interstate Commerce Act in the circumstances of this case permit it to require a sale of the assets to a single intermediate purchaser for liquidation at a discount from fair market value which reflects the costs and profits of the intermediate purchaser when the Reorganization Court has held that such a sale would be improvident and would not be approved by it?

6. Has the Statutory District Court erred in concluding that payment of a substanial portion ($83.1 million) of the minimum price required by the Constitution is satisfied by the delivery of shares of Penn Central common stock having a market value of $60.21 million on the date of the transfer of the assets and a value of $50.35 million of even date with the valuation of the assets, if supplemented by an undertaking by Penn Central to pay on February 1, 1978 the difference between $83.1 million and the then market value of the shares?

7. Has the Statutory District Court erred in failing to hold that the Commission violated Section 5(2) of the Interstate Commerce Act or Section 77 of the Bankruptcy Act in requiring the transfer of the New Haven's right to receive $5.6 million annually from the Grand Central Terminal real estate and hotels, without any compensation to the New Haven for such transfer?

8. Has the Statutory District Court erred in failing to hold that the Commission violated Section 5(2) of the

Interstate Commerce Act or Section 77 of the Bankruptcy Act in failing correctly to analyze and compute the discount to present worth of the net proceeds to be anticipated in a hypothetical liquidation?

9. Has the Statutory District Court erred in failing to hold that the Commission violated Section 5(2) of the Interstate Commerce Act or Section 77 of the Bankruptcy Act in valuing the New Haven's Harlem River and Oak Point freight yards at less than their present use or highest and best use?

10. Has the Statutory District Court erred in failing to hold that the Commission violated the Fifth Amendment to the Constitution of the United States or Section 77 of the Bankruptcy Act in requiring the transfer to Penn Central of certain securities owned by the New Haven, without any compensation to the New Haven for such transfer?

11. Has the Statutory District Court erred in failing to hold that the Commission violated Section 5(2) of the Interstate Commerce Act or Section 77 of the Bankruptcy Act in failing to require Penn Central to assume the operating losses incurred by the New Haven between February 1, 1968 and December 31, 1968?

12. Where the Commission and the Courts have required the continuation of deficit operations without interruption and imposed upon Penn Central, as merger applicants, the requirement that the applicants, after merger, shall operate the service of the New Haven and pay a fair and equitable price for the assets, is a price fixed without assignment of value to the intangible going concern values which permit Penn Central to continue the service without interruption, fair and equitable?

13. Has the Statutory District Court erred in accepting valuations arrived at by the Commission in violation of the rights of the bondholders to due process where

the Commission improperly tailored its findings and conclusions to suit its design for the national transportation policy and subordinated to that design its obligation to adjudicate the evidence impartially?

14. Under all the circumstances, has the Statutory District Court erred in modifying and sustaining the Fourth Supplemental Report and order, as modified?

Statement

The New Haven is and has been a Debtor in reorganization under Section 77 of the Bankruptcy Act in the United States District Court for the District of Connecticut since July 7, 1961. The Bondholders Committee has been authorized to represent holders of the New Haven's First and Refunding Mortgage Bonds in the reorganization proceedings since February 5, 1962. As of December 31, 1968, the holders of the First Mortgage Bonds have outstanding claims totalling $101,659,900, consisting of $76,819,900 for principal and $24,840,000 for interest.

The New Haven Trustees (Trustees), during the first six months of the trusteeship, concluded and publicly stated that the New Haven would have to be liquidated unless it could be merged with a large trunk line railroad system because its income could not meet its expenses even without regard to fixed charges on bonded indebtedness.

On March 9, 1962, Penn and Central jointly filed their application with the Commission for authority to merge Central into Penn. The Trustees, on June 26, 1962, petitioned the Commission for inclusion of the New Haven into the proposed Penn-Central system as a condition precedent to that merger. The Trustees did not file proposed terms of inclusion and the Penn-Central merger record before the Hearing Examiners was closed in July, 1963.

In June, 1964, the Trustees and Penn and Central commenced secret negotiations toward a sale of the New Haven assets to Penn Central. After four meetings, a basic Memorandum of Agreement was signed in December, 1964 and February, 1965, but it was not announced. Once having arrived at the basic agreement with Penn Central, the Trustees, on January 15, 1965, petitioned the Reorganization Court for authority to apply to the Commission for authorization to discontinue all passenger service. (The negotiations and agreement with Penn Central were not disclosed.) The Reorganization Court granted the requested authority by Order Number 287, dated February 15, 1965. In March, 1965, the Trustees filed the discontinuance application with the Commission.

On March 29, 1965, the Hearing Examiners' report in the Penn Central merger case was issued. It provided for inclusion of only the New Haven's freight service. Terms of inclusion were not recommended as the Trustees had presented no evidence on the question of fair and equitable terms. Promptly on March 31, 1965, the Trustees announced, for the first time, that they had entered into an agreement with Penn Central for the sale of New Haven assets to Penn Central and the consideration to be received. The formal agreement for the sale of the freight operations was executed on April 21, 1966 (Agreement).*

The Commission, with knowledge of the Agreement, then simultaneously issued two reports and orders, both bearing a service date of April 27, 1966, deciding the *New Haven Passenger Discontinuance Case,* 327 I.C.C. 151 (1966) and the *Penn Central Merger Case,* 327 I.C.C. 475 (1966). In essence, the Commission denied the passenger discontinu-

* The Trustees never sought and have never received authorization to sign the Agreement and the Reorganization Court has never approved its terms. When, for the first time, the terms of the Agreement were submitted to the Reorganization Court for approval by the Inclusion Report, the Reorganization Court rejected the terms.

ance on the basis of its Penn Central merger decision which required inclusion of the New Haven passenger and freight operations into Penn Central, as a condition of the merger.*

The condition fixed by the Commission is as follows:

"8. The Pennsylvania New York Central Transportation Company shall be required to include in the transaction all the New York, New Haven and Hartford Railroad Company—the inclusion of passenger operations being subject to the findings and determinations of the Commission as set forth in Finance Docket No. 23831 issued simultaneously with this report—upon such fair and equitable terms as the parties may agree subject to the approval of the Bankruptcy Court and the Commission. Within 6 months after the date this report is served, the parties shall file with the Commission for its approval, a plan for such inclusion. In the event the parties are unable to reach an agreement (and subject to approval by the Bankruptcy Court) such inclusion shall be upon such fair and equitable terms and conditions as the Commission may impose. * * * Jurisdiction is hereby reserved for such purposes. Consummation of the merger by applicants shall indicate their full and complete assent to these requirements." (327 I.C.C. at p. 553)

In October, 1966, the Trustees and Penn Central amended the Agreement to reflect the assumption of both freight and passenger operations.

Pursuant to the above condition, Penn Central filed its petition for approval of the Agreement as a plan of in-

* This had the effect of imposing continued deficits upon the New Haven in the public interest at a time long after it had become clear that no reorganization of the New Haven was possible and only a sale of the New Haven's assets to Penn Central was in contemplation by the Commission and the Reorganization Court.

clusion on October 27, 1966 and the Trustees, on the same date, filed the identical plan as the "first step" of a plan of reorganization.

Hearings on the October 27, 1966 petitions of Penn Central and the Trustees were held in New York City before a Hearing Examiner and concluded on May 12, 1967. By Commission order, a report or recommended decision of the Hearing Examiner was omitted and the record was submitted to the Commission for initial decision. The issues were submitted for decision upon the filing of reply briefs on July 17, 1967.

By a cross-petition dated April 26, 1967 filed in the Reorganization Court, the Bondholders Committee sought the termination of the reorganization proceedings to permit the orderly liquidation of the assets of the New Haven. The Reorganization Court, in a decision issued on February 13, 1968, dismissed the cross-petition. *In re New York, N.H. & H.R.R.*, 281 F. Supp. 65 (D. Conn. 1968) (Jt. App. p. 234a).

Pursuant to a "Partial Ruling" of the Reorganization Court, dated July 11, 1967, the Commission was requested to require inclusion by lease of the operations of the New Haven in Penn Central simultaneously with consummation of the Penn Central merger. On August 1, 1967, the Commission ordered the Trustees and Penn Central to file an agreement providing for operation of the New Haven by lease, within 30 days, or, in the absence of such agreement, to file their respective proposals for terms of a lease. Penn Central and the Trustees rejected the order as not feasible.

On September 1, 1967, Penn Central filed a proposal to lend $25 million over three years to New Haven and the Trustees filed a separate proposal for a loan arrangement plus an arrangement for Penn Central's assumption, as an addition to the purchase price, of operating losses of the

New Haven incurred from the time of the merger until the sale of the New Haven.

By order dated September 12, 1967, the Commission amended its August 1, 1967 Order and set September 25, 1967 for hearings to commence before a Hearing Examiner on the question of an "appropriate arrangement" for support of New Haven operations.

Hearings were held on September 25, 26 and 27, 1967 in Washington, D. C. These hearings resulted in that part of the Inclusion Report that has been referred to as the "loan-loss formula"; thereafter condemned by all courts for its *in terrorem* provision.

While the proceedings were pending before the Commission and the Reorganization Court, the Bondholders Committee requested this Court to enjoin consummation of the Penn Central merger unless and until the feasibility of inclusion was finally assured. The Bondholders Committee predicted:

> "It is entirely possible that the Commission will not require Penn-Central to pay the equivalent of the liquidation value of the New Haven. If that is the case, when an approved plan of reorganization is forwarded from the Commission to the Reorganization Court in accordance with Section 77 of the Bankruptcy Act, it can be expected that the Reorganization Court will recognize that a sale of the New Haven for less than its liquidation value would effect an unconstitutional taking of property." (Jurisdictional Statement filed November 17, 1967 in case number 831, October Term, 1967. *Penn.-Central Merger and N & W Inclusion Cases*, 389 U. S. 486 (1968).)

After the filing of the jurisdictional statement, but prior to argument before this Court, the Commission

issued its Inclusion Report and furnished copies to this Court. Both the Commission and Penn Central attacked the Bondholders Committee's argument by assuring this Court that consummation of the Penn Central merger would eliminate any claim that inclusion was unfair to Penn Central or to the public interest because the New Haven's liquidation value exceeded its value as an operating railroad to Penn Central and that fairness to the New Haven as determined by the Reorganization Court, would be the only open question. This Court denied the Bondholders Committee's request to enjoin the Penn Central merger, stating:

> "The bondholders agree that to delay the Penn-Central merger until all proceedings necessary to include the NH had taken place may well mean the end of NH operations. The only realistic way to avoid this is to permit prompt consummation of the Penn-Central merger subject to appropriate conditions respecting the New Haven which Penn-Central will perforce accept by its act of merger. While the rights of the bondholders are entitled to respect, they do not command Procrustean measures. They certainly do not dictate that rail operations vital to the Nation be jettisoned *despite the availability of a feasible alternative.*" (389 U. S. at pp. 510-11) (emphasis added)

The Penn Central merger was consummated on February 1, 1968.

Judicial review of the Inclusion Report and orders then proceeded in both a statutory three-judge District Court for the Southern District of New York and the Reorganization Court.* Both courts found that the Commission had committed numerous errors and both remanded the pro-

* The decision of the Statutory District Court sustaining the parallel review proceedings is reprinted at 289 F.Supp. 418, 424 fn. 3 (Jt. App. p. 325a).

ceedings to the Commission. *New York, N.H. & H.R.R. Bondholders Committee* v. *United States*, 289 F.Supp. 418 (S.D.N.Y. 1968); *In re New York, N.H. & H.R.R. Co.*, 289 F.Supp. 451 (D.Conn.1968).* Prior to its decision, the Reorganization Court had appointed the Honorable John Van Voorhis, a retired Judge of the New York Court of Appeals, as a Special Master to hear and report on the questions relating to the New Haven's right, title or interest in the Grand Central Terminal properties (the entire land area extending roughly from 42nd Street to 53rd Street and between Madison and Lexington Avenues, in the heart of New York City). Special Master Van Voorhis held hearings on July 8, 1968 through July 13, 1968 and the record of those hearings was incorporated into the record before the Commission. The Special Master filed

* Judge Weinfeld catalogued the errors as follows: "(1) the Commission's failure to discount New Haven's liquidation expenses over the projected six-year liquidation period, 289 F. Supp. at 427-28; (2) its miscalculation of New Haven's right to surplus income from the Grand Central Terminal properties, *id.* at 428-33; (3) its ambiguous valuation of the Harlem River and Oak Point freight yards, *id.* at 433-34; (4) its erroneous valuation of New Haven's interest in the Boston & Providence Railroad, *id.* at 434-35; (5) its failure to discount the 5% bonds with which Penn Central was to meet its obligations under the Purchase Price Adjustments, *id.* at 437-38; (6) its error in deducting from the amount to be paid to New Haven the sum of outstanding real estate tax liens, *id.* at 438; (7) its failure to indicate the source of its estimate of 1966 depreciation of New Haven properties, set forth in its brief before us but not in its Inclusion Report, *id.* at 438; (8) its miscalculation of the cost to Penn Central of Penn Central's 5% bonds, its assumption of New Haven's obligations under the Boston & Providence mortgage, and its payment under the Purchase Price Adjustments, *id.* at 439; (9) the Commission's failure to take into account a reduction in 1966 New Haven equipment obligations, *id.* at 439 n. 15; (10) its conclusion that Penn Central would assume overmortgaged New Haven equipment, *id.* at 439; (11) its failure to include any of Penn Central's absorption of New Haven's interim operating losses in the category of the cost of acquisition to Penn Central, *id.* at 440; (12) its use of a sliding-scale formula for Penn Central's interim loss-sharing as a device to curtail litigation by the New Haven bondholders, *id.* at 444; and (13) its tendency to 'round off' sums, with a consequent loss of some $5.3 million to the New Haven estate, *id.* at 427." (Jt. App. p. 432a, fn. 2).

his main report on June 18, 1968 and a supplemental report on July 22, 1968.

In addition to remanding the Inclusion Report to the Commission for the correction of its many errors, the Reorganization Court also held that the continuation of the New Haven's deficit railroad operations after December 31, 1968 would stretch the subjection of the New Haven's creditor's rights to the public interest beyond the constitutional limits. The Reorganization Court incorrectly held that imposition of the deficits to December 31, 1968 by it and the Commission had not exceeded the constitutional limits.

Hearings on the issues remanded to the Commission were commenced on October 7, 1968 and were completed on October 15, 1968. By Commission order, a report or recommended decision of the Hearing Examiner was omitted and the record was presented to the Commission for initial decision. Requests for oral argument before the Commission were denied. The Commission issued its Fourth Supplemental Report (Remand Report) on November 25, 1968. The Remand Report ordered the binding transfer of the New Haven assets to Penn Central, free and clear of all liens, but without prejudice to continued litigation on the question of price. The Commission stated:

> "In our view the inclusion should not be delayed pending judicial review of either price or the reorganization plan. The primary consideration is the public interest, and in the present context, the continuation of NH service without interruption is a public interest matter of paramount importance. A takeover should occur on January 1, 1969, even in view of the high probability that litigation will continue beyond that date over the price and other terms of the inclusion." (334 I.C.C. at p. 76).

By order dated December 24, 1968, the Reorganization Court ordered the transfer of substantially all of the assets of the New Haven, free and clear of all liens, but without prejudice to the right of any party to contest the fairness and adequacy of the consideration. On that basis, the transfer of assets took place at midnight December 31, 1968 and, in accordance with the public interest declaration of the Commission, the New Haven's railroad operations were continued without interruption.

Penn Central's applications to enjoin the December 31, 1968 takeover were denied by the Reorganization Court and the Statutory District Court (Jt. App. pp. 263a, 387a).

Judicial review of the Remand Report, which adopts and reaffirms the Inclusion Report, except where expressly modified, again proceeded in both the Statutory District Court and the Reorganization Court.

The Reorganization Court, in a decision dated May 28, 1969 and by its orders entered on July 1, 1969 and July 28, 1969, held that Penn Central was indebted to the New Haven in the amount of $3,377,903.07 on account of past debts;* that Penn Central must pay $29,035,899 as an addition to the purchase price stated in the Commission's Remand Report; and that $83.1 million of the purchase price could be paid by delivery of 950,116 shares of Penn Central common stock supplemented by provisions guaranteeing payment of $87.50 per share by February 1, 1978. The July 28, 1969 order of the Reorganization Court sets forth the following specific findings and conclusions:

> "1. The sums of (a) $15,386,000 as a consequence of possible delay in abandonment and (b) $6,695,000 as a bulk sales discount should not be deducted from the Commission's finding of liquidation value;

* By Supplemental Order No. 572 dated July 1, 1969, this amount was offset against a sum owed to Penn Central by the New Haven. (Jt. App. p. 309a).

2. The value of the Harlem River and Oak Point Freight Yards is $22.539 million, which is an increase of $4.439 million over the amount found by the Commission;

3. The sum of $1.6 million should be added to liquidation value inasmuch as it was improperly deducted in respect of tax obligations;

4. The sum of $1.5 million should be deducted from the liquidation value inasmuch as it was improperly attributed to the so-called 'CCBIs' to be issued by Boston and Providence Railroad Corporation;

5. The sum of $2,415,899 should be added to liquidation value inasmuch as it was improperly deducted in applying the discount to present value found by the Commission; and

6. The value of the 950,116 shares of common stock delivered by Penn Central on December 31, 1968 to the Debtor is $83.1 million, subject to the provisions hereinafter set forth in ordering Paragraph B [guaranteeing payment of $87.50 per share]." (Jt. App. p. 318a)

On June 18, 1969, the Statutory District Court filed its opinion, with Judge Weinfeld dissenting in part. A decree, with an accompanying memorandum, was filed by the Statutory District Court on September 11, 1969 (Jt. App. p. 446a) and that is the decree which is the subject of this appeal. The decree directs an addition to the purchase price set by the Commission in the Remand Report of $990,000.*

* The decree also provides for the payment by Penn Central of its debt of $3.38 million as an offset as provided in the July 1, 1969 order of the Reorganization Court (Supplemental Order No. 572). (Jt. App. p. 309a). Both courts erroneously rejected the Bondholders Committee's claim for interest on the amounts adjudicated to have been improperly withheld.

As is apparent, the two courts differed substantially; the differences total $28,045,899.

The Statutory District Court computed the net increase of $990,000 as follows:

> "1. An increase of $1,600,000 representing an adjustment in the treatment of accrued real estate taxes;
>
> 2. An increase of $410,000 representing an adjustment to the discount to present worth arising from decreases in valuation of properties of the New Haven Railroad;
>
> 3. An increase of $480,000 representing the amount by which the Commission overvalued the assumption by Penn Central Company of the obligations of the New Haven Railroad in respect of its Harlem River Division Bonds; and
>
> 4. A decrease of $1,500,000 representing the overvaluation of the New Haven Railroad's interest in the Boston & Providence Railroad Corp.;" (Jt. App. p. 448a)

The Statutory District Court required the $990,000 to be paid as follows: 57.1% in Penn Central common stock, 37.4% in Penn Central Bonds and 5.5% in cash with interest at 6% from December 31, 1968.

In respect of the value of the Penn Central stock delivered and to be delivered, the Statutory District Court, agreeing with the Reorganization Court, found that the stock did not have the value attributed to it by the Commission, absent a formula for guaranteeing the payment in 1978 of $87.50. The Statutory District Court established a formula modeled on the formula established by the Reorganization Court but different in several respects.

The issues on which the courts differ from the Commission, or from each other, are as follows:*

1. "Abandonment delay discount" of $15,386,000—The Reorganization Court found the discount to be erroneous and the Statutory District Court upheld the discount, Judge Weinfeld dissenting (see page 45, *infra*).

2. "Bulk sales discount" of $6,695,000—The Reorganization Court found the discount to be erroneous and the Statutory District Court upheld the discount, Judge Weinfeld dissenting (see page 45, *infra*).

3. Harlem River and Oak Point Freight Yards—The Reorganization Court found that the Commission had made an error amounting to $4,439,000. The Statutory District Court sustained the Commission, Judge Weinfeld dissenting (see page 63, *infra*).

4. Deduction of $1,600,000 for accrued real estate taxes—Both courts (the Statutory District Court, unanimously) found the Commission's deduction to be erroneous.

5. Consideration for the transfer of the New Haven's Boston and Providence Railroad Corporation "CCBIs"—Both courts (the Statutory District Court, unanimously) held that the CCBIs should be transferred to Penn Central without consideration and that the Commission erred in fixing the price Penn Central should pay at $1.5 million (see page 70, *infra*).

6. Discount of net proceeds to present worth—Both courts (the Statutory District Court, unanimously) held that the Commission had erred; the Reorganization Court

* This appeal also involves issues upon which the Commission and both courts have agreed, but with which the Bondholders Committee disagrees. The rights of appeal from the earlier decision of the courts have been preserved.

calculated the error to be $2,415,899 and the majority judges of the Statutory District Court accepted the Commission's post-decision calculation of the error at $410,000 (see page 64, *infra*).*

7. Assumption of the Harlem River Division Bonds—The Statutory District Court unanimously held that the Commission overvalued Penn Central's assumption of these bonds by $480,000; the Reorganization Court sustained the Commission.**

8. Value of the Penn Central shares—Both courts found that the Commission erred in attributing a value of $83.1 million to the Penn Central shares delivered as part of the purchase price; the Reorganization Court and the Statutory District Court (Judge Weinfeld dissenting) required, under certain conditions, that Penn Central be obliged to pay to the New Haven the difference between the market value of the shares at February 1, 1978 and $83.1 million. Judge Weinfeld dissented on the ground that the New Haven was presently entitled to the cash equivalent of the property transferred (see page 35, *infra*).

9. Form of payment of additional consideration—The Statutory District Court required the additional consideration to be paid in the same proportion of stock, bonds and cash as the first payment; the Reorganization Court order permits the Commission, on remand of the reorganization plan, to determine the manner and form of payment of additional consideration.

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* Since the post-decision calculations were submitted in connection with proposed decrees reflecting the majority's opinion, Judge Weinfeld did not participate in the question of the proper calculation.

** Neither Penn Central, the Commission nor the United States have appealed from the Statutory District Court's determinations and the Commission adopted the view of the Statutory District Court in the Fifth Supplemental Report (334 I.C.C. at p. 530). Although the Bondholders Committee has appealed from the order of the Reorganization Court, this issue now appears to have been conceded to the bondholders.

Conscious that the wide difference in the opinions of courts of equal jurisdiction required that the differences be resolved by the Supreme Court, the Statutory District Court stated:

> "* * * reconciliation of divergent views will come ultimately in the nation's highest court, which alone can speak with authority." (Jt. App. p. 431a)

In its subsequent memorandum relating to its decree, the Statutory District Court commented upon the substantial difference between the two courts in respect of the discount of proceeds to present value and concluded:

> "The difference in the treatment of this item by the two courts will be another matter for ultimate resolution by the Supreme Court." (Jt. App. p. 445a)*

The Reorganization Court has held final approval of a New Haven plan of reorganization in abeyance, stating: "* * * approval must await a final determination as to price and, presumably, that issue can be definitely determined only by the Supreme Court, * * *" (Jt. App. p. 315a)

Both courts recognized not only the jurisdiction of this Court, but that the proceedings could not be advanced by a remand but only by the exercise by this Court of its jurisdiction.

The Questions Presented Are Substantial

The questions presented by this appeal are substantial and require plenary consideration for their resolution.

Several appellees have indicated that in their responses they may propose to the other parties to these appeals an expedited procedure which, subject to this Court's ap-

* See page 65, *infra*.

proval, would include an abbreviated briefing schedule. For this reason, the discussion in this jurisdictional statement of the questions in controversy is somewhat longer and more detailed than it would otherwise be.

The New Haven, having had no profits since 1958, filed a reorganization petition under the Bankruptcy Act, in 1961. It became almost immediately apparent to the Trustees and the Reorganization Court that no reorganization of the New Haven as an operating railroad was feasible because the revenues did not and could not be expected to equal the expenses even if all of the fixed charges for bonded indebtedness were eliminated. The Reorganization Court and the Trustees, considering the important public interest in the New Haven's railroad operations,* determined to seek a buyer for its railroad properties which would continue to provide the service rather than a buyer or buyers who would dismantle the property and terminate its railroad functions. In 1962, Penn and Central, the first and fourth largest railroads in the country, sought to merge. The Department of Justice (Antitrust Division) unconditionally opposed the merger. Penn and Central thereupon agreed with the Trustees to purchase the New Haven's assets and to continue the railroad service.** Thereafter the Justice Department withdrew its unconditional opposition to the merger. The Commission in approving the Penn Central merger relied heavily upon the benefit to the public which would follow from a merged Penn Central's con-

* In the *Penn Central Merger Case*, former Commissioner Tucker stated: "The New Haven Railroad is the fourth largest private carrier of passengers in the world. Its freight revenues alone exceed the total revenues of either of the B & M, D & H, Jersey Central, Susquehanna, or Western Maryland railroads." 327 I.C.C. at p. 551. See also, *Baltimore & Ohio R. Co.* v. *United States*, 386 U. S. 372 (1967).

** As this Court has noted, Penn Central had earlier refused to purchase the New Haven. See *Baltimore & Ohio R. Co.* v. *United States*, 386 U. S. 372 (1967); *Penn-Central Merger and N & W Inclusion Cases*, 389 U. S. 486, 494 (1968).

tinued operation of the New Haven service as well as on the public interest in the financial strengthening of Penn and Central through merger savings. It was not, however, until February 1968, that Penn and Central merged. From the commencement of the reorganization in 1961 the Commission and the Reorganization Court compelled the New Haven estate to continue to operate at deficits amounting to over $60 million through loans and deferred payments which took precedence over the claims of the mortgagees, the Commission rejecting the Trustees' application to discontinue the passenger service and the Reorganization Court rejecting the bondholders' application to dismiss the reorganization proceedings.

The major questions herein arise because the Commission and the courts ruled that continuation of the New Haven's railroad service, although operable only at a deficit, was essential to the public interest and that the public interest required the sale of the New Haven's assets to Penn Central, a purchaser designated by the Commission to continue the railroad service and that the service must be continued at the creditors' expense until Penn Central could be compelled to assume the operations. The Reorganization Court had recognized that the operating deficits could not constitutionally be imposed upon the creditors of the New Haven for more than a reasonable period (289 F.Supp. at p. 459). The Commission, however, in determining the price to be paid to the New Haven estate for its assets, has held that its powers to formulate the national transportation policy permit it to impose upon the New Haven estate the burden to contribute to future losses it anticipates Penn Central will incur in continuing the New Haven service by ordering a price less than the fair market value of the assets obtainable in liquidation sales under judicial supervision.

This appeal raises the important Constitutional question of whether the Commission or the Reorganization

Court, acting to preserve without interruption railroad service for the benefit of the public interest, has the power to require the sale of assets for a price lower than the standard of just compensation required by the Fifth Amendment to the Constitution upon a taking of property for the benefit of the public interest. The Reorganization Court, charged under the Bankruptcy Act and pursuant to condition 8 to the Penn Central merger with the responsibility for approving or disapproving the sale, has answered this question in the negative. The Commission has answered the question in the affirmative, and two judges of the Statutory District Court have substantially sustained the Commission.

The differences between the two courts amounting to $28,045,899, is sufficient to establish this appeal is substantial.

Another facet of the question is whether the seller may be compelled to accept assets having a net cash value less than a price determined to be the net cash value of the assets transferred. The Commission answered this question in the affirmative. Both courts recognized that the Commission's answer was incorrect and two judges of the Statutory District Court adopted a formulation put forward by the Reorganization Court which would provide the gross cash value by February 1, 1978. One judge of the Statutory District Court said the seller was entitled to receive the equivalent of the net cash value.* The difference between the value attributed to the Penn Central shares ($83.1 million) and their net cash equivalent in discharge of the purchase price varies with the date determined finally to be the appropriate valuation date. At December 30, 1966, the Penn Central shares had a market value of $50.35 mil-

* Referring to the valuation of the Penn Central shares, Judge Weinfeld said: "The New Haven estate is entitled to the equivalent of $83.1 million as part of the purchase price." (Jt. App. p. 441a)

lion. At December 31, 1968, the Penn Central shares had a market value of $60.21 million.* The minimum difference involved in this question is $22.89 million, sufficient by itself to establish that this appeal is substantial.

These, and other substantial questions are discussed below.

Subordinating its responsibility to fix the value of the New Haven assets and the equivalent consideration as impartial judges to its administrative function of formulating national transportation policy, the Commission deprived the New Haven of due process of law.

Initially, the Commission had before it the determination of a fair and equitable price to be paid by Penn Central for substantially all of the New Haven assets. The Commission could fairly have determined the price but for the fact that it concluded that its responsibility for the design of national transportation policy required it to fix a low price to aid the merged system. To the extent that impartial determinations on the basis of the evidence demanded that the Commission require Penn Central to pay a price higher than that volunteered by Penn Central when the Justice Department still opposed the merger, the Commission saw itself as the instrument through which the "public" would be deprived of some of the benefits of the Penn Central merger. The Commission desired two goals that could not be reached unless one of its functions was made subservient to the other. On the one hand it sought to compel Penn Central to continue the deficit-producing New Haven service; on the other, it sought to preserve intact the value to

* The seller will also have substantial brokerage commission expenses upon the sale of the shares to reduce them to cash.

Penn Central of the merger benefits. It therefore abandoned its judicial impartiality and tailored its findings and conclusions to suit the accomplishment of its administrative functions. The normal respect due the findings of an administrative agency should not be accorded to the Commission's reports.

This case presents dramatically the "conflict of interest" problem inherent in an adjudication by an administrative agency charged with the making of policy. Fundamentally, this case simply involves the sale of the property of a large company to a giant company. Cases involving the fairness of such transactions are commonly presented to the courts without intervention of an administrative agency. Some common examples are condemnation cases, sales by fiduciaries and cases in which dissenting shareholders to a corporate merger seek the adjudication of the value of their shares. In those cases the judicial function is limited to a determination of the fair market value of the property being transferred without regard to the commercial value of the property to the specific purchaser. The determinations of value in this case, however, have been overwhelmed by the Commission's interest in the public benefits to be derived from the merger of Penn Central, the largest railroad merger in history, and the Commission's recognition of the hopelessness of accomplishing a reorganization of the New Haven providing railroad service to New England absent the Commission's assumption of a power to compel Penn Central to purchase the assets and provide the service.

Whereas the Commission at first appeared to have found a public interest justification for the Penn Central merger in Penn Central's willingness to assume the New Haven operations as a merger condition, it later confessed that Penn Central's merger application could not have been properly denied even without its acceptance of this condition because the merger savings strengthened the

stability of both roads and redounded to the benefit of the using public. Thus it can be seen that even in the imposition of the condition that Penn Central acquire the assets of the New Haven, the Commission recognized that already in the Penn Central merger case it had subordinated its judicial function to its administrative assumption of power; in the fixing of the price Penn Central should pay for the New Haven assets it considered itself bound to lean over backwards to ameliorate the impact of the condition. The Commission was unfortunately forced into this unhappy position because neither the states nor the Federal government had acted to condemn or subsidize the New Haven operations in the public interest. In this case, the Commission sought to provide that legislation by imposing a portion of the subsidy temporarily upon Penn Central* and a portion of the subsidy in perpetuity upon the New Haven bondholders. From the time of its first approval of the Penn Central merger, the Commission was therefore constrained to preserve to Penn Central the benefits of the merger. Its evaluation of the evidence and determination of the price and consideration were further prejudiced by its commitment to preserve those benefits.

The Commission has repeatedly made clear that it understood its dominant function to be to assure the continuation of the New Haven's railroad operations by the transfer of those operations to a profitable and successful Penn Central. In the Inclusion Report, the Commission stated:

> "* * * as the agency entrusted with and responsible for 'developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the

* The Commission reserved the power to relieve Penn Central of the deficits if the states do not in the future assist Penn Central. The states have already commenced to take over substantial segments of the Penn Central's New Haven Division deficit passenger operations.

> Postal Service, and of the national defense,' *our efforts necessarily must be directed towards assuring the continuation of the NH's railroad service.*" (331 I.C.C. at p. 700) (emphasis added)

The Commission's "efforts" were also directed toward the preservation of the Penn Central merger benefits. To achieve its two goals the Commission contends that "fairness to the public" overrides any requirement that it find the fair market value of the New Haven assets and require payment of an amount equal to that value. It does not even consider that it is bound to be "fair" to the New Haven creditors or to fix a price "constitutionally required". In the Remand Report the Commission stated:

> "The creditors point to the potential savings resulting from the [Penn-Central] merger as the major justification for whatever price is *fair* to them *or constitutionally required.* This was not the intent of our decision. We did not approve the merger in order merely to satisfy the creditors of NH or even primarily to rescue NH. * * * We spoke * * *, in terms of *fairness to the public,* and to the security-holders of both NH and Penn-Central. * * * While the provision of a home for the NH was an important consideration, particularly regarding the timing of the merger, it was not alone decisive of the merits of the merger. There were many other public interest factors supportive of the merger; * * * *A significant tapping of the annual savings to favor the NH creditors would not be in public interest.* The savings are needed to support the transportation operations of the former Penn and Central, now the country's largest transportation system." (334 I.C.C. at p. 66) (emphasis added)*

* Of course, any failure to tap the merger savings was not ultimately for the benefit of the creditors but to spare the states, the Federal government and Penn Central at the creditors' expense.

The foregoing must be read in the light of the opinion of former Commission Chairman Tucker in the Penn Central merger approval report,

> "Furthermore, in a balancing of the benefits and detriments of the present transaction, *the New Haven Railroad problem must be given very substantial weight.* The newly merged railroad corporation enabled herein will provide a framework for preservation of an important rail plant—serving four States in a highly populous area—*which, but for this unification, might face liquidation.*" (327 I.C.C. 475, at pp. 550-551 (1966)) (emphasis added)

The Commission has confessed it abdicated its responsibility to fairly hear the evidence presented to it and to adjudicate the issues impartially and justly. It was inhibited from making true findings of value and disregarded the evidence presented, in order to preserve the justification for the imposition of continued New Haven service upon Penn Central without impairing the justification for the Penn Central merger.

In the Inclusion Report the Commission stated:

> "A paramount consideration in these proceedings is the continuation of NH's essential service. As previously stated, the record demonstrates that such service is in jeopardy because of the serious attrition of NH's cash resources. *The findings and conclusions made herein* and the action resulting therefrom *are designed to meet this problem.*" (331 I.C.C. at p. 655) (emphasis added)

The litigants, after more than 40 days of contested hearings and the submission of a massive quantity of exhibits, are entitled to expect findings and conclusions based upon

the evidence presented and not "designed to meet this problem."*

Whereas in the Inclusion Report the Commission's inhibitions arising from its imposition of the New Haven's operations on the surviving transportation system could be uncovered only by an analysis of its treatment of the evidence, in the Remand Report the Commission has come out in the open by adjusting the price to ease the impact of this imposition. The Commission stated:

> "To ignore Penn Central's interest under the statutes or the Constitution would be to ignore the public interest in preserving NH service; if the price required in law for NH is so high that we would be compelled to hold it unfair to Penn Central the result would be to deny the public need for the service. Whether we view the interests of the estate or the rights of the creditors, we are of the view that the Constitution requires but a fair price, and that such a price cannot in logic or law be divorced from what is fair to Penn Central." (334 I.C.C. at pp. 75-6)

The only alleged "unfairness" to Penn Central of requiring payment of at least the full salvage value of the New Haven rests upon the assumption that Penn Central cannot liquidate the New Haven's assets because the Commission has imposed upon it the burden of continuing the railroad service (334 I.C.C. at p. 66). The Commission cannot, by the device of fixing a price less than the market value of the assets, tax the New Haven creditors with a share of the burden of Penn Central's anticipated losses from future operations and stamp upon the price tag the words "fair and equitable". The burden has been imposed upon Penn Central by the Commission and not by the New

* With respect to the findings of valuation of both the assets and the consideration it must be noted that *no* commissioner heard the evidence and the Hearing Examiner to whom the evidence was presented filed *no* report.

Haven and if the burden becomes too great, the Commission can relieve Penn Central of all or a portion of it (334 I.C.C. at p. 67).

Understandably, the Commission is concerned with the "public" whose interest it is charged to cherish. But the proposed transaction is a sale of New Haven assets to Penn Central upon "fair and equitable terms", and the New Haven must be paid the fair market price for its assets as shown by the evidence, and not a price which most benefits the public. The payment of the proper price is not inconsistent with the public interest because it invades, to some modest extent, the enormous financial benefits anticipated from the Penn Central merger (331 I.C.C. at p. 688).

If paying full salvage value for the New Haven assets would dissipate substantially the public's benefits in the Penn Central merger, then the Commission should now relieve Penn Central of the burden of maintaining the service and itself permit Penn Central to liquidate the New Haven and realize the full salvage value. To hold that the Commission may require the New Haven bondholders to accept less than full salvage value is to hold that the mortgagees must be required to take less than the value of their security because of the Commission's power over Penn Central. The Commission's dilemma may not be resolved by constrained and tortured evaluations of evidence which have the effect of concealing the denial of due process behind a veil labeled "valuation findings."*

* The Reorganization Court has declared: "The Commission also asserts that, because the Constitution does not specify any particular method of valuation, it possesses unrestricted flexibility and range of discretion; and 'due process' and 'just compensation' referred to in the Fifth Amendment mean compensation based upon the value of the assets remaining after the debtor's estate has been invaded to the unlimited extent the Commission finds is called for by the paramount public interest, provided the Commission takes pains to declare it fair and equitable. This is tantamount to no constitutional protection whatever." (Jt. App. p. 282a)

The Commission's anxiety was in any event misplaced and represented an over-reaction to its uncertainty of the propriety of its imposition of condition 8 upon Penn Central since by its merger Penn Central accepted the condition. The Penn Central merger savings are expected to reach $81 million per year (327 I.C.C. at p. 501; 389 U.S. at p. 493), which sum, capitalized at the 8% rate used by the Commission in this case, is approximately $1 billion (see 289 F. Supp. pp. 440, 449). On the basis of 23 million shares outstanding, the merger savings increase Penn Central's annual earnings per share by $3.52 per share. Every million dollars of additional 5% bonds Penn Central is required to issue to the New Haven costs $50,000 per year and invades the earnings per share to the extent of 21 *mills* per share. The issuance of an additional $100 million of bonds would reduce the increment of $3.52 per share to $3.31 per share. Not only would the public interest not be affected by this insignificant decrease in the merger benefits, but Penn Central's shareholders would still enjoy virtually all of the profits of the merger.

The Commission's prejudice in favor of the surviving transportation system has dominated its findings and conclusions throughout these proceedings. The private constitutional and legal rights of bondholders have been cut to fit the pattern the Commission believes to be in the public interest. In such an instance, the reviewing courts should subject the record and the proceedings to the closest scrutiny and enlarge their scope of review so as to restore fairness to the process of litigation. See *Atlantic Coast Line R.R.* v. *St. Joe Paper Co.*, 179 F. 2d 538, 542-3 (5th Cir. 1950), *cert. denied*, 339 U.S. 929 (1950); see *In re Larsen*, 17 N. J. Super. 564, 86 A. 2d 430 (App. Div. 1952) (concurring opinion, Brennan, J.). The majority of the Statutory District Court erred in this respect as did, in some lesser measure, the Reorganization Court.

II

The Statutory District Court, having properly determined that the Commission had erred in concluding that 950,000 shares of Penn Central stock had a value of $83.1 million, erred in failing to require a payment in cash or securities having a cash value of $83.1 million.

In both the Inclusion Report (331 I.C.C. at pp. 688-690) and the Remand Report (334 I.C.C. at p. 68 fn. 40) the Commission approved the payment by Penn Central of part of the purchase price in the form of 950,000 shares of Penn Central common stock. The Commission, anticipating the market's evaluation of its projection of estimated savings, valued the shares at $87.50 per share and credited Penn Central with payment of $83.1 million of the purchase price. (331 I.C.C. at p. 688).

At the date of the transfer of assets, December 31, 1968, the New York Stock Exchange closing price was $63⅜.* As a result, on the basis of the market value at the time of transfer, the New Haven received shares valued at only $60.21 million. On the review of the Remand Report, the Statutory District Court stated:

> *"Our views on this subject parallel those recently expressed by the reorganization court * * * in the last analysis the market is the true appraiser* and, if anticipations, not matter how well founded, should not be achieved, a proper adjustment should be made. We find Judge Anderson's solution of this difficult prob-

* The closing market value as of December 1, 1969 was $31¼ per share. As of the valuation date of the New Haven assets, December 30, 1966, the Pennsylvania stock closed at $53 per share. The Bondholders Committee has argued, and continues to argue, that the market value of the shares on December 31, 1966, the valuation date for the New Haven property, should govern the transaction.

lem to be admirable and direct that the order be modified as provided in his opinion.'" (Jt. App. pp. 429a-430a) (emphasis added)

The Reorganization Court held the stock valuation to be unfair as follows:

"There is an element of unfairness, however, in the fact that the New Haven has transferred assets conservatively worth what the liquidation value says they are worth. *The purchase price, to the extent of $83.1 million and fully credited to the purchaser as $83.1 million paid, is not worth $83.1 on the present market.* It is credited as $83.1 paid, on an assurance or assumption that the 950,116 shares will be worth that sum and more, but when and who will make good on that assurance is not known or not stated. The ordinary purchaser of shares of stock takes it subject to his losing or gaining on the money he put into it. But the New Haven is not that kind of purchaser; it is being compelled to take it at a substantial present loss on an assurance of future gain. But suppose the shares never go to 87½ in the whole ten years to February 1, 1978? (Jt. App. p. 299a-300a) (emphasis added)

But suppose the shares *do* reach $87½ on February 1, 1978 but not before? The New Haven estate will then have been deprived of the income on at least $23 million for nine years and the expenses of sale.*

The Reorganization Court's "supplemental provision fulfilling the implicit promise by the purchaser to pay $83.1 million as part of the price for the assets conveyed" (Jt. App. p. 300a) was therefore inadequate, unfair and unconstitutional. A provision which may be generally described

* In valuing the New Haven property, the selling expenses, including real estate brokerage commissions, were charged to the New Haven.

as an underwriting by Penn Central of the price of $87.50 per share as of February 1, 1978,* is not the cash equivalent to which the New Haven was entitled upon the transfer. At best, the New Haven is given an unsecured, inchoate claim which would not be discharged in full, if at all, in the event Penn Central became insolvent before February 1, 1978. If the New Haven presently had shares which could be sold at a price which would yield $83.1 million, it would not be compelled to rely on the ability of Penn Central to discharge its obligations in cash in 1978.

Particularly in the instant case, where the purchase price is based upon liquidation value, the payment of that purchase price in securities valued at other than liquidation value cannot be supported. The shares, even with a guaranteed payment as of February 1, 1978 of $87.50 per share, have not a liquidation value of $87.50 and are not fair exchange for assets having a liquidation value of $87.50. In a later opinion, accompanying its order, the Reorganization Court acknowledged that its stock formula "raises a serious issue." (Jt. App. p. 315a).

Penn Central stock is a seasoned security that is actively traded in a free, fair and orderly market, to wit, the New York Stock Exchange. The closing price of $63⅜ on De-

* The order of the Reorganization Court and the decree of the Statutory District Court spell out the terms of the underwriting in some detail. The two courts differ in some respects. The Commission, in its modified Fifth Supplemental Report, accepts the concept of the stock underwritings. 334 I.C.C. at p. 532 (Aug. 28, 1969). Judge Weinfeld believed that the form of the solution should be remanded. He stated: "The New Haven estate is entitled to the equivalent of $83.1 million as part of the purchase price. After hearing the parties upon a remand, the Commission may require the issuance of a larger number of shares or otherwise provide for that sum." (Jt. App. pp. 441a-442a) Our brief on the merits will urge that this Court order the $83.1 million be paid in cash, leaving to the Commission under section 20(a) of the Interstate Commerce Act the power to determine the proportion of Penn Central shares and bonds it should authorize Penn Central to sell to discharge this obligation.

cember 31, 1968 was achieved under normal conditions and was not a "spot price" resulting from market fluctuations.*

No valid purpose is served by attributing a high estimated future value to the shares; that simply imposes an unfair penalty upon the New Haven creditors. The Reorganization Court's statement that Penn Central is relieved of payment of a large amount of cash while New Haven is afforded an opportunity to participate in future profits (Jt. App. p. 299a) would be adequately answered by simply requiring the payment to be in a sufficient number of shares of stock to achieve a liquidation value at closing of $82.1 million (1,309,664 shares at $63⅜ per share).**

Whatever form the consideration is to take as a matter of convenience to Penn Central, the New Haven is entitled to receive full payment in the equivalent of cash. The New Haven has been deprived of at least $22.89 million of the purchase price.

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* The average of the high and low prices for November and December 1968 was $62.81 per share. (Jt. App. p. 299a) The market price was $63-3/8 on the date of the Remand Report (Jt. App. p. 299a).

** If the New Haven desires an "opportunity to participate in probable future profits" of Penn Central, it can purchase Penn Central shares in the open market. There was no reason not to require Penn Central to sell enough shares to provide for the payment in cash, itself absorbing the selling commissions. Penn Central could only be helped by a broader dispersion of its shares among public stockholders.

III

The Statutory District Court erred in sustaining the Commission's failure to require Penn Central to pay any consideration for the transfer to of it the New Haven's share of the income from the Grand Central Terminal real properties formerly utilized by the New Haven to pay for its share of the station expenses.

The Commission (331 I.C.C. at pp. 679-684; 334 I.C.C. at pp. 30-39), the Reorganization Court (289 F.Supp. at pp. 462-463), and the Statutory District Court (289 F. Supp. at pp. 428-433) all agree that the New Haven is the owner of a valuable interest in a large real property development located in the heart of New York City which has been referred to throughout these proceedings as the "Grand Central Terminal Properties" or "G.C.T. properties."* In earlier state court proceedings the New Haven had been described as an equal partner with the Central in these properties. *New York Central R.R.Co.* v. *New York, New Haven & Hartford R.R. Co.*, 13 A.D. 2d 309, 216 N.Y.S. 2d 928, (1st Dept. 1961), aff'd. mem. 11 N.Y. 2d 1077 (1962) (Biltmore Case).

The properties were appraised in these proceedings as of April 19, 1965 at $227,225,000. The appraisal, however, was not utilized by the Commission (or the Courts), which undertook to value the New Haven's interest on the basis of a capitalization of the New Haven's share of estimated

* The phrase "Grand Central Terminal" is not the same as "Grand Central Station". The "Terminal" properties include not only the station and railroad facilities, but the entire land area extending roughly from 42nd Street to 53rd Street and including Madison Avenue (in part), Park Avenue (in toto), and Lexington Avenue (in part). The railroad tracks are underground and such world famous buildings as the Pan Am Building, the Waldorf-Astoria, Commodore, Biltmore, Roosevelt and Barclay Hotels, 277 Park Avenue and the Yale Club are included.

future income in excess of the estimated future expense of the operation of Grand Central Station, treating as a proper item of expense, Penn Central's costs in operating the New Haven service into Grand Central Station. The Commission's attempt in the Inclusion Report to value the New Haven's interest at $13 million was found to be erroneous by both courts. The Commission, after the remand, found that the G.C.T. income was $18,400,000 per annum, derived from four general sources developed by the joint venture (a) income from leases and franchises in the station itself (referred to by the Commission as "Terminal Revenue"); (b) income from office buildings, primarily under net leases; (c) net profits from the five hotels;* and (d) miscellaneous income (referred to by the Commission as "Other income") (334 I.C.C. at p. 39).**

As a result of procedures broadly described in 1907 and 1913 agreements between the New Haven and the New York Central, the G.C.T. income from the various sources was historically deposited in a common account, referred to as the "Terminal Account." Under the terms of the agreements between New Haven and Central, the New Haven was obligated to pay a proportion (based upon its proportion of car entrances—considered by the Commission and all parties to be 41%) of the fixed charges on the financing of the cost of construction of the previous depot and the new Terminal, and the cost of operating and maintaining the new station and the railroad facilities (289 F.Supp. at p. 429). These expenses were paid initially from the New Haven's share of the income flowing into the Terminal Account, and the balance due was then paid in cash by the New Haven. The result would have been the same had the New Haven's share of the G.C.T. income been paid over to it entirely, with the New Haven then paying its full share

* The railroads operated four hotels themselves, through a wholly-owned subsidiary, Realty Hotels, Inc. The Waldorf-Astoria is operated by a lessee.

** The Bondholders Committee disputes the Commission's income projections. The dispute will be developed in briefs on the merits.

of the terminal costs and expenses in cash. The New Haven annual share of the costs and expenses averaged $5.6 million per year out of total annual expenses of $13.6 million (334 I.C.C. at p. 32). Commencing with the year 1964, the total G.C.T. income exceeded the total expenses. After 1963, therefore, the New Haven's share of $5.6 million and the Central's share of $8 million were paid out of funds deposited in the Terminal Account, and an "excess" of income was accumulated.

The Commission and the Courts have held that the New Haven owns a 50% interest only in the so-called "excess income" and that Penn Central need pay only the capitalized value of that interest in exchange for acquiring all of the rights and interest of New Haven in the G.C.T. properties. The Commission has computed total annual income at $18,400,000 and total expenses at $13,850,000; leaving "excess income" of $4,550,000. New Haven's 50% share is $2,275,000 which, capitalized at 8%, equals $28,438,000, the sum Penn Central is required by the Commission to pay (334 I.C.C. at p. 39).

It is clear, however, that as a result of the sale transaction, Penn Central receives the *entire* annual income of $18.4 million, which sum includes the $2.275 million for which compensation is provided and the $5.6 million previously used by the New Haven to discharge its obligations arising from its use of the station, for which no compensation is provided. Nevertheless, the Commission and the Statutory District Court,* by investing the notion of an assumed liquidation with the property of effecting a forfeiture, have held that Penn Central acquired the right to receive the $5.6 million of annual income, the capitalized value of which is $70 million, without having to pay for

* The Reorganization Court has concluded that the Commission's determination should not be disturbed in this regard, although it indicated disagreement with the Commission's view (Jt. App. pp. 314a-315a; 289 F.Supp. at p. 486).

it.* The agreements provide for a substantial minimum rent to be paid by the New Haven.

The bondholders, in respect of the evidence of the New Haven's interest in the G.C.T. properties, proceeded on the basis that they were equal partners in the proceeds of sales of the G.C.T. properties and entitled not only to 50% of the "excess income" but to a vested right in that portion of the income theretofore used to defray the New Haven's share of expenses relating to the G.C.T. properties and the New Haven's share of the Station expense. On December 31, 1966, the valuation date, had all the G.C.T. real estate been sold, the New Haven would have been entitled to one-half of the net proceeds of sale. Admittedly, these sales could not take place unless both the New Haven and Central agreed, but the New Haven's consent alone, and its right to withhold that consent, was a valuable asset. When the Commission designated Penn Central to purchase the assets of the New Haven, the New Haven was in full possession of the right to agree or not to agree to the sale of the G.C.T. properties. It was a full partner. Further, if the Commission had not permitted Penn Central to discharge its obligation to pay for the New Haven assets with shares and bonds rather than cash, Penn Central could have raised the cash by agreeing with the New Haven to the sale of the G.C.T. real estate, utilizing Penn Central's share of the proceeds of sale for such purpose and the New Haven would have realized at the same time its share of the proceeds of sale. As a result of the assumption that the liquidation would have worked a forfeiture of the New Haven's right to consent or withhold its consent to a sale and New Haven's right to its share of the proceeds of sale, Penn Central is now free, at one stroke, to realize all of

* The Commission recognized that Penn Central can now sell the G.C.T. properties (334 I.C.C. at p. 66). Presumably, Penn Central would be paid at least $70 million for properties which produce income of $5.6 million.

the share the New Haven would have realized had the G.C.T. real estate been sold on the valuation date.

The Commission put forward this extraordinary proposition in order to deliver to Penn Central, without payment therefor, the $5.6 million of income the New Haven had regularly contributed, so as to reduce the burden to Penn Central of carrying the deficits to be anticipated from the imposition upon it by the Commission of the obligation to provide the service the New Haven had formerly provided and to prevent the erosion of $5.6 million of the anticipated $81 million of annual merger savings. Since, however, the Commission could always relieve Penn Central of the obligation to perform the service if the states did not assume the burden, the net effect of attributing no value to the New Haven's interest in the income flow except for the "excess income," was to impose permanently upon the New Haven creditors the burden of sustaining railroad operating deficits to the extent of $5.6 million per year.

In fact, within one year after the transfer of the New Haven properties to Penn Central, the burden of the New Haven West End Commuter operations into New York City has been lifted from the shoulders of Penn Central by New York State and Connecticut. The opinions of the Statutory District Court and the Reorganization Court had all recognized the possibility that the states would in fact relieve Penn Central of the obligation to conduct the West End Commuter service but determined the possibility was too speculative to be valued. The importance of the New Haven service which persuaded the Commission to compel Penn Central to perform the service as a condition of the merger would have remained equally important had the Commission not imposed condition 8. In liquidation, a concept which assumes that the New Haven would not have to continue to provide the service, the states would surely have condemned in order themselves to provide the service.

Even if it is argued that such a condemnation was not absolutely certain, the prospect of such a condemnation was substantially probable. The attribution of no value to this palpable opportunity is arbitrary and capricious.*

The Statutory District Court, arguing that the New Haven should not receive the entire $5.6 million free of any obligation to contribute to the fixed charges and expenses of the G.C.T. properties (Jt. App. p. 419a) declined to provide that the New Haven was entitled to receive that portion of the $5.6 million that would not be needed to meet the New Haven's contribution to the fixed charges and expenses. It was error to hold that because an argument might be made against the New Haven receiving the capitalized value of the entire $5.6 million, the Commission was nevertheless correct in failing to compensate the New Haven for any part of the $5.6 million.

To hold that the New Haven must transfer, without consideration, its right to share in the proceeds of the sale of G.C.T. real property, or its power to consent or withhold its consent to such sales by Penn Central, or to retain all or a portion of the $5.6 million annual income flow and to hold instead that valuation on the basis of a hypothetical liquidation involves a forfeiture of all these rights and that such forfeiture is one hundred per cent certain, effects an unconstitutional taking of the property of the New Haven. This taking is all the more objectionable since the New Haven's valuable rights were passed on to Penn Central, a private corporation organized for profit, in order to as-

* If one accepts, arguendo, the Statutory District Court's view that the $5.6 million of annual income is "dedicated" to the profitless commuter service, it seems certain that a condemnation or purchase on the basis of a standard of "just compensation", would not allow the operations, including the right to this income, to be acquired without payment. *Port Authority Trans-Hudson Corp.* v. *Hudson Rapid Transit Tubes Corp.*, 0 N.Y. 2d 457, 285 N.Y.S. 2d 24 (1967), *cert. denied*, 390 U. S. 1002 (1968).

sist it in meeting burdens imposed only temporarily by the Commission and of which it has been almost immediately relieved by the states.

A full exposition of the G.C.T. issues will be set forth in briefs on the merits.

IV

The "pricing considerations" of abandonment delay and bulk sale discount, introduced by the Commission in the Remand Report, are arbitrary deductions of $22.1 million from the New Haven's minimum constitutional liquidation value imposed in the name of the public interest in Penn Central's financial well being and not valid bases of valuation.

The deductions of $15,386,000 for so-called "abandonment delay" and $6,695,000 for a so-called "bulk sale discount" were arbitrary and capricious, manufactured by the Commission in order to reduce the price to be paid by Penn Central as near as possible to the consideration Penn Central had agreed to pay in its 1964 negotiations with the Trustees. The history of these proceedings points inexorably to the conclusion that, before it had heard a single witness, the Commission had determined to find that the consideration Penn Central had agreed with the Trustees to pay for the New Haven assets was fair and equitable to both sides and in the public interest. Indeed, when the Commission wrote condition 8 which provided that Penn Central was required to purchase the New Haven assets and provide its service "upon such fair and equitable terms as the parties may agree subject to the approval of the Bankruptcy Court and the Commission" (327 I.C.C. at p. 553), the Commission already knew the terms to which Penn Central had agreed. It must be recalled that the Commis-

sion's object in approving the Penn Central merger was to strengthen the financial position of both of those companies (327 I.C.C. at pp. 498-502).

The memorandum of a negotiations meeting between Penn, Central and the Trustees in 1964 shows that the Trustees and Penn Central had fixed the consideration at 950,000 shares of Penn Central common stock, $23 million face value of Penn Central bonds and $8 million in cash because the Trustees considered that this consideration would be equal to $70 million, an amount determined not from a consideration of liquidation values, but on the basis of comparative book values. The memorandum shows that the parties valued the shares at $41 per share, the then current market price for Penn stock. The parties considered that the 950,000 shares provided $38,950,000 of the $70 million consideration and not the $83.1 million attributed to them.

In 1967, hearings were finally held by the Commission for the stated purpose of determining whether the Agreement was "fair and equitable." Evidence of liquidation value of the New Haven assets was offered by the Trustees who were obliged by the Agreement to urge the fairness of its terms. The Trustees' evidence showed a cash liquidation value as of December 31, 1965 of $153;247,000 (331 I.C.C. at p. 661) and that figure omitted $28.4 million of value which the Commission and the Courts have held should be placed upon the New Haven's interest in the G.C.T. properties. Consistent with their obligations under the Agreement, the Trustees offered testimony designed to show that the self-same consideration which they had accepted in 1964 in discharge of a value of $70 million, was still "fair" to discharge an obligation they valued at $153 million, although at the time of the hearings the approximate price of Penn shares was $53 per share. The Commission in the Inclusion Report found an "equivalence" by assigning an "inherent value" of $87.50 per

share to the Penn Central shares and by assigning a value of $128.97 to the assets* which still left the assets with a value $5.3 million more than the assigned value of the consideration (289 F.Supp. at p. 427). The Commission then declared that the values it had assigned to the assets and the consideration were close enough to be deemed equivalent so that the Agreement was labeled "fair and equitable." The conclusion is inescapable that the findings of the Inclusion Report were tailored to fit the Agreement and that the Commission had not exercised its judicial functions in determining either the value of the assets or the value of the consideration, but had contrived to select from a record of some 4000 pages those bits of evidence which would lend the color of "rationality" to the Commission's findings. The "coincidence" of the equivalence cannot otherwise be explained.

Although the Inclusion Report was roundly rejected by both courts because of egregious errors which the Statutory District Court indicated resulted in the undervaluation of the New Haven assets by $45 to $50 million and which the Reorganization Court found to undervalue the New Haven assets by $33 to $55 million, both courts considered that many of the objections to the Commission's findings made by the bondholders had to be rejected because of the respect to which Commission findings are entitled. When the two courts rejected the Inclusion Report they were also not inclined to consider that the Commission had overvalued the Penn Central shares used as part of the consideration.

On the remand, the Commission found that the New Haven's interest in the "excess income" from the G.C.T. properties should be valued at $28.89 million instead of the $13 million found in the Inclusion Report (334 I.C.C.

* This total included $13 million attributable to New Haven's interest in the G.C.T. properties.

at p. 39) This was the inescapable result of the holdings by both courts and Special Master Van Voorhis that the Commission had erred in using "nuisance value" as one factor in the equation by which it arrived at the $13 million figure.* As for all of the rest of the errors pointed out by the courts, the Commission purported to make new deductions from the values it had assigned to the assets in the Inclusion Report with the result that it contrived a method for deducting an amount equal to the value of *all* of the non-G.C.T. errors found by both courts. In consequence, the additional consideration found by the Commission to be due was $15.6 million, which coincidentally matched the increase in the valuation of the New Haven's interest in the G.C.T. excess income. The new deductions were of a nature so arbitrary and capricious that the Reorganization Court rejected them. But the majority of the Statutory District Court was still convinced that the Commission's findings were entitled to great respect because they were issued by an administrative agency.

It is in the light of these circumstances and this history that the Commission's deductions for so-called "abandonment delay" and "bulk sale discount" must be considered.

• • •

In its 1968 decision remanding the Inclusion Report to the Commission the Statutory District Court stated:

> "The Commission is therefore directed to make detailed findings as to each element of liquidation value and of the consideration to be paid by Penn Central on a basis consistent with this opinion. If it agrees with our view that the price cannot be less than the liquidation value, it shall prescribe suitable terms." (289 F.Supp. at p. 441)

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* The courts also directed the Commission that the New Haven's interest in the "excess income" was 50% and not 30%, the factor used in the Commission's equation.

At the beginning of the Remand Report, the Commission stated:

> "In the *inclusion* report, we found that the net liquidation value of NH's assets was about $125 million. Each of the figures necessary to a computation of this net amount was contained in that report, except a figure of $3 million for 1966 depreciation which was referred to only in general terms. The courts have held that we erred in certain specifics in computing the liquidation value." (334 I.C.C. at p. 30) (emphasis in original)*

After discussion of what it considered to be the "specifics" of liquidation value, the Commission concluded that "The net liquidation value of the NH estate is $162.7 million" (334 I.C.C. at p. 53).** The Commission then rejected the prior holding of the Statutory District Court "that the price cannot be less than the liquidation value" and stated:

> "It appears, therefore, that an inflexible rule of law prescribing liquidation value (as computed above) as the minimum to which the creditors are entitled might lead to unfair results. In regard to this we believe there are other considerations relevant to the price the creditors should expect to receive and Penn Central to pay. We proceed further in this analysis, because we believe that the liquidation value we have found above is not itself a fair and equitable price and is not required as a matter of law." (334 I.C.C. at p. 54)

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* The Inclusion Report contained the Commission finding "that the liquidation value of the NH assets to be conveyed to Penn-Central is about $125 million as of December 31, 1966." (331 I.C.C. at p. 688)

** While the Commission did not add the phrase "as of December 31, 1966", that date must follow from a reading of both Commission reports.

The Commission then defined the "other considerations relevant to price" as the public's interest in having the railroad service continued by Penn Central. It stated:

> "It is inequitable to conceive at the same time both a right in the bondholders to break up the NH and an obligation on Penn Central to keep it going. The demands of equity are no more satisfied by conceiving that the bondholders have a constitutional right to shut down the NH which is superior to the public's right to keep it going." (334 I.C.C. at p. 54).

But the bondholders' constitutional rights to shut down the New Haven *are* superior to the "public's right to keep it going." The public's "right" is not a constitutional right at all, but is in fact limited by the Fifth Amendment to the Constitution. The Commission's approach depends upon its incorrect interpretation of the Constitution and the cases of *Brooks-Scanlon Co.* v. *Railroad Commission,* 251 U. S. 396 (1920); *Bullock* v. *Railroad Commission,* 254 U. S. 513 (1921); and *Railroad Commission* v. *Eastern Texas Railroad,* 264 U. S. 79 (1924). The Commission states:

> "The Supreme Court in our view has never flatly held that a deficit-ridden railroad has an absolute right to abandon, liquidate, and sell the parcels. The thrust of *Eastern Texas, Brooks-Scanlon,* and *Bullock* is that a deficit railroad has a right to stop the deficits. It does not follow, we believe, that it has the immediate right to abandon, nor the rights derived therefrom to break up the railroad and to receive the maximum salvage value." (334 I.C.C. at p. 56).*

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* In this regard, the Statutory District Court stated "we would suppose that the constitutional right to abandon operations implies a right to break up the railroad and sell the parcels for their highest and best prices" (Jt. App. p. 417a).

This represents a change in the Commission's position. It was an attempt to avoid the earlier ruling of both Courts on this constitutional issue. The Reorganization Court summarized the earlier positions taken by the Commission and the Courts on this question and showed the inherent error in the Commission's new position.

> "The Commission had argued that the constitutional right of a deficit operated railroad to cease operation and liquidate, as recognized by Supreme Court cases, had been considerably modified by later statutes.'
>
> Judge Friendly, in writing for the Three Judge Court, fully answered this as follows at p. 441:
>
> 'We cannot accept the argument that all this was changed by the addition of §1(18), requiring the Commission's consent to abandonment, to the Interstate Commerce Act by the Transportation Act, 1920, or by the enactment of §77 of the Bankruptcy Act in 1933. These statutes were designed to assure orderly procedures and to afford methods that might avoid the ultimate solution; they were not intended to override constitutional guarantees, cf. In re Third Avenue Transit Corp., 198 F.2d 703, 707 (2 Cir. 1952), and would not be effective if they had been.' [Footnote omitted.]
>
> Now the I.C.C. argues that the leading case in support of the courts' position, *Brooks-Scanlon Co. vs. Railroad Commission of Louisiana*, 251 U. S. 396 (1920), and the subsequent cases relying on it, were overruled, sub silentio, by *Colorado* vs. *United States*, 271 U. S. 153, 156, 168 (1926), in which, the Commission says, its 'role in weighing the advantages and disadvantages of an abandonment of branch lines that lose money was preserved • • • The Supreme Court in our view has never flatly held that a deficit ridden railroad has an absolute right to abandon, liquidate and sell the parcels.' 334 I.C.C. at pp. 55-56.

> As this interpretation of the applicable law is the key to the Commission's conception of the scope of its own power, which in turn underlies most of the extraordinary and unprecedented actions taken by the Commission in formulating its Fourth Supplemental Report and Order as they affect the matter of price, it is necessary to go into an analysis and discussion of the pertinent cases.
>
> The factual setting, for the legal principles to be expounded, is unique. New Haven's deficits were not limited to unprofitable segments of an overall profitable system. Quite the contrary. New Haven's long-time deficits were system wide. And it is this court's conclusion from an examination of the cases, that the I.C.C. is plainly in error in the legal principles which it advanced." (Jt. App. pp. 286a-287a)

The Commission framed the issue as a conflict between the constitutional "right of the bondholders to break up the NH" and the Commission imposed "obligation on Penn Central to keep it going." Even assuming that the combination of Section 77 of the Bankruptcy Act and Sections 1(18) and 1(20) of the Interstate Commerce Act permit the Commission to require the New Haven to favor among prospective purchasers that customer who would continue the operations, those statutes do not give the Commission power to designate a price lower than the price the New Haven would otherwise receive in liquidation sales made at fair market value. Despite the Commission's contrary argument, the public interest *must* "allow the dismantling of a carrier which is losing money."* unless the

* The Commission stated: "* * * we cannot conclusively presume that the public interest would allow the dismantling of a carrier which is losing money" (334 I.C.C. at p. 55). The Commission begs the question. If a carrier loses money in a single year and elects to dismantle, the Commission might be entitled to enjoin. But where, as here, the Commission and the Reorganization Court had both held that there was no foreseeable possibility that the New Haven service could operate except at a loss, the right to dismantle is fixed. Even assuming the Commission's consent is required, the Commission may not withhold its consent. *Brooks-Scanlon Co.* v. *Railroad Commission, supra.*

Commission provides, or a third party offers to pay, the equivalent. The Commission itself designated Penn Central as the customer. Since Penn Central, by its merger, has accepted the obligation to fulfill the public interest requirements, *it* must pay the equivalent. The New Haven's property cannot be sacrificed to the public interest because the Commission designated Penn Central to be the buyer. Justice Brandeis, speaking for a unanimous court in the leading case of *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555 (1935) concluded:

> "For the Fifth Amendment commands that, however great the Nation's need, private property shall not thus be taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public." (295 U.S. at p. 602)

The law can be no different because the Commission, to satisfy the public interest, has found a non-governmental buyer who has obliged itself to operate the railroad in order to reap the substantial benefits resulting from the Commission's conditional consent to merge.

After discussing the questions concerning the New Haven's rights to receive its liquidation value* as the minimum price permissible under the Constitution or applicable statutes, the majority of the Statutory District Court stated:

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* Both the Statutory District Court (Jt. App. p. 41la) and the Reorganization Court (Jt. App. pp. 291a-292a) make clear that the term "liquidation value" means "fair market value". The Commission referred to the evidence as "showing asset values upon an assumed liquidation" (331 I.C.C. at p. 657) and equated "liquidation value" with "the values that sales of the railroad in parcels for their highest and best use would bring" (334 I.C.C. at p. 53).

"Because of the way the Commission has approached the valuation question, we do not feel called upon finally to decide these intriguing issues. The Commission set out to fix a price that would give NH what it thought the estate could realistically hope to achieve on liquidation." (Jt. App. p. 410a)

Had the majority of the Statutory District Court had as clearly in mind as the Reorganization Court the history of the Agreement which the Commission approved in the Inclusion Report and the strained "coincidence" by which it reached an equality between the value of the assets conveyed and the consideration stated in the Agreement, it could not have reached the above conclusion. The majority overlooked the fact that the Commission itself demonstrated that its so-called "pricing considerations" were nothing more than deductions from liquidation value designed to preserve the public interest in Penn Central merger benefits and to value the property on the basis of its value to Penn Central which was not free to liquidate because of its acceptance of the Commission imposed obligation to provide the New Haven service.

The Commission summarized its findings as follows:

"Under the instructions of the three-judge court, we have found the liquidation value of NH is $162.7 million. We have further found that other pricing considerations require and justify a reduction of $22.1 million from the liquidation value. We find and conclude that a price that is equitable to the estate and to Penn Central results from the $22.1 million reduction, and that NH is, therefore, entitled to consideration totalling $140.6 million (exclusive of loss sharing).

The two courts which reviewed our inclusion report tentatively held that the estate was entitled to liquidation value from Penn Central as a matter of constitutional law. In addition to our prior discussion, em-

phasizing the law and the fairness of the other pricing considerations to the creditors, a few other comments will be made regarding the lack of fairness to Penn Central of pricing NH at its immediate liquidation value on a breakup basis. *In valuing the estate, we cannot ignore the fairness to Penn Central. We do not read either section 5 or section 77 to require the fairness to the estate to be determined without regard to* the public interest or to the fairness to the buyer. * * *

The NH liquidation value is in many respects highly hypothetical insofar as Penn Central is concerned; it is a value that for the most part is unrealizable by Penn Central and frozen into the assets. *Penn Central is not free to liquidate and must continue the operation of the property in the public interest.*" (334 I.C.C. at pp. 65-66) (emphasis added)

The majority of the Statutory District Court never addressed itself to the significance of the quoted conclusions. Instead, they accepted Commission rationalizations which were inapplicable to the case of the New Haven. The surface plausibility of the Commission's rationalizations were pierced by the Reorganization Court and Judge Weinfeld dissenting in the Statutory District Court. The majority finally upheld the deductions on assumptions and conclusions which were at variance with the Commission's actual motivations, methods and expressions and the evidence before the Commission.

(a) The "abandonment delay" discount

The first of the Commission's so-called "imposed reasonable limitations" is described as a "limitation on the right to abandon" (334 I.C.C. at p. 58). The Commission's explanation of this "limitation" is that lengthy administrative proceedings would be required by the Commission before a certificate of abandonment would be issued, thereby creating a one-year delay before the liquidation program

could be commenced and a "freeze" of New Haven activity for that period. The financial result of the Commission's "limitation" is a deduction of $15,386,00 from the price to be paid to the New Haven.

The inapplicability of this rationalization to the facts in the New Haven case is set forth in the Reorganization Court's opinion:

> "There remains its claim that the use of the term 'fair liquidation value' demands the consideration of and deduction from gross liquidation proceeds of all the burdens, delays, costs and expenditures derived from court and Commission proceedings to terminate a reorganization effort and institute an equity receivership to effect a liquidation. While in the present case the Commission referred only to the delay attendant upon leave to abandon, it is equally logical to hypothesize all of the steps which would necessarily precede actual liquidation. The Commission never entertained any such concept on the first round. If there is only one exclusive and universally recognized meaning to the term fair liquidation value and that meaning must include all steps in liquidation proceedings, it is indeed strange that the I.C.C. did not consider it in the Second and Third Supplemental Reports. Its declared reasons for not doing so are transparent pretexts under the cover of which the Commission arbitrarily and capriciously confers a benefit—not on the public—but on Penn Central, which would obtain New Haven's assets at a price substantially below fair liquidation value and yet comply with the condition for the Pennsylvania-New York Central merger that it take over the New Haven" (Jt. App. p. 291a).
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> "There was nothing in the actual facts of the case which required a hypothetical concept which included

a consideration of all the legal proceedings from termination of the reorganization to completion of liquidation. Neither the hypothetical concept nor the actual case requires consideration of such legal proceedings. It was not until the Fourth Supplemental Report that the Commission hauled in by the heels the issue of the right to abandon as a condition precedent to liquidation, and used it as an arbitrary device to reduce what it found the liquidation value to be, i.e. $162.7 million, because it felt that figure was too high to be fair and equitable to Penn Central" (Jt. App. p. 292a).

The majority of the Statutory District Court felt obliged to attribute to the Commission "assumptions" which were never made or required. The majority said:

> "The further adjustment in the Remand Report amounts to assuming that the *decision to liquidate* would have been taken on that date [January 1, 1967] but that liquidation could not begin until a year later because of the necessity for obtaining a certificate of abandonment under §1(18)." (Jt. App. p. 411a) (emphasis added)

The Commission made no assumption of a "decision to liquidate" on January 1, 1967 and there was no basis for the statement of the majority of the Statutory District Court that

> "The effect of what the Commission has done here is to assume that liquidation could have begun on January 1, 1968, a month before the PC merger occurred and NH's right to inclusion thereby accrued." (Jt. App. p. 413a)

All that the Commission needed to have done if it intended the valuation date to be January 1, 1968 rather than January 1, 1967, was to make a deduction of $3 million for

depreciation.* Instead, the Commission has deducted $15,386,000.**

In its 1968 decision, the Reorganization Court held that any erosion of the New Haven's 1966 liquidation value beyond December 31, 1968 would constitute a taking of the bondholders' property without just compensation in violation of the Constitution (289 F.Supp. at 459). The Commission did not appeal from Reorganization Court's decision, but instead, created the "abandonment delay" discount. The Reorganization Court recognized that the Commission's deductions from liquidation value were no more than an attempt to circumvent the Reorganization Court's constitutional determination. It stated:

> "Like Laban of old, the Commission would now require further servitude of the debtor—in this case the creditors. But the duty of the debtor's creditors to suffer losses for an interim period has already been fulfilled and the public interest has already been served to the extent that in fairness and equity the public had any right to demand. This proposition is clear beyond doubt. The public interest may well have been over-protected. The solution most consistent with the public interest has been worked out and the I.C.C. has no power or right to require more." (Jt. App. p. 283a)

In addition, as briefs on the merits will show, "lengthy abandonment proceedings" are not applicable to the New

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* The valuation testimony gave values for December 31, 1965. The Commission used a valuation date of December 31, 1966 and deducted $3 million for depreciation to account for the difference in value of some of the property one year later. The bondholders have urged and continue to urge that the "depreciation" deduction was incorrect.

** In full briefs, we will show that the factors added together to reach the $15,386,000 deduction were inapplicable and incorrecly computed.

Haven, a railroad which was earlier recognized by this Court, at the urging of the Commission, to have no alternative but inclusion or liquidation. (389 U.S. at p. 507).*

(b) The "bulk-sale" discount

The second of the so-called "reasonable limitations" imposed by the Commission is described as a "limitation on the right to break up the railroad" (334 I.C.C. at p. 60). The reduction from liquidation value amounts to $6,695,000 (334 I.C.C. at p. 62). The Statutory District Court refers to the limitation as the "bulk-sale discount" (Jt. App. p. 416a). The Commission based this reduction from liquidation value on the following legal analysis:

> "The liquidation value urged by the creditors assumes not only the immediate right to abandon, discussed above, but also the right to break up the railroad and sell the parcels for their highest and best price. We think such a right may be restricted when a buyer for the entire bulk of the NH properties appears who will continue the operation of needed services." 334 I.C.C. at p. 60).
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> • • •
>
> "• • • we may compel the bulk sale and the bulk sale discount as a condition of an abandonment certificate,

* In the Inclusion Report the Commission stated: "If there is one thing on this record that is clear and undeniable, it is that NH has neither earning power nor the prospect of earning power" (331 I.C.C. at p. 687). As early as December 7, 1961, the Commission stated: "* * * in the absence of any sharing of the burden [of operations] by the Federal government the debtor may be forced to cease all operations within the next two years. In that event, we are satisfied that the proceeds of liquidation would be sufficient to repay all loans guaranteed under the provisions of part V of the Act." *New York, N.H. & H.R.R. Loan Guaranty*, 312 I.C.C. 471 (1961).

and, therefore, as a reduction of the present price." (334 I.C.C. at p. 61).*

But the Statutory District Court rejected the analysis as follows:

> "We entertain the gravest doubt concerning the legal premise underlying this argument; we would suppose that the constitutional right to abandon operations implies a right to break up the railroad and sell the parcels for their highest and best prices." (Jt. App. p. 417a)

Forced to seek some grounds other than the one expressed by the Commission in order to sustain the result, the Statutory District Court seized upon bits and pieces of Commission language to attribute an analysis to the Commission unrelated to its expressed assumption of arbitrary power. The Statutory District Court stated:

> "'However, the Commission also stated 'The bulk-sale discount merely reflects a market appraisal of the risks that the estate avoids, and the bulk buyer assumes,' 334 I.C.C. at 61, and that the discount 'fully recognizes, without conceding, NH's right to abandon and liquidate the estate.' 334 I.C.C. at 63. While the Commission's language is not pellucid, we read this as saying that the Commission deducted the discount as a proper measure of risks not taken into account by the appraisals and the discount to present value." (Jt. App. p. 417a)

The Commission's "language is not pellucid" to the Statutory District Court because it was looking for some-

* In addition, even if under section 1(20) the Commission may "compel the bulk sale" to one who would continue operations in accordance with the "public convenience and necessity", a discount from fair market value to reduce the purchase *price* is *not* required by the "public convenience and necessity." The Commission did not even engage in the attempt to make such a finding.

thing that was not there, was never intended by the Commission to be there and could not be based upon the evidence.* The second sentence quoted by the Statutory District Court was taken from the middle of a conclusory paragraph which refers to the entire $22.1 million reduction and which does not treat the "bulk-sale discount" as a correction to the appraisal evidence introduced by Penn Central as well as the Trustees and the bondholders. The entire paragraph is as follows:

> "The limitations that lawfully may be placed on the creditors' rights to abandon and to break up the property justify reduction of at least $22,081,000 in the price. This reduction is fair and equitable to the creditors. It fully recognizes, without conceding, NH's right to abandon and liquidate the estate. The net price after such reductions simply deducts from the price the equitable equivalent of the creditors' rights to less than an immediate parcel-by-parcel breakup of the railroad." (334 I.C.C. at p. 63)

The analogy of the "bulk sale discount" to the payment of a fee to an underwriter of securities suggested by the Statutory District Court (Jt. App. p. 418a), was never made by the Commission. The fact that a speculator would pay less than fair market value is not significant. It is not the bargain hunter but the willing buyer whose bid to a willing seller determines fair market value.

The Reorganization Court has held that it could not countenance a discount sale to a speculator under these circumstances.

> "Further the bulk sale deduction violates the fair upset value minimum for sales of a debtor's property,

* Mr. Simon, the witness whose testimony gave rise to the "bulk-sale discount" theory, acknowledged that he had never seen the appraisals of the New Haven properties and that he was unfamiliar with the New Haven.

> as provided in §77(b)(5), because 'fair upset value' is the lowest price the debtor's estate could accept for the properties. That lowest price is what the market would pay, which is implicit in the standard used here, i.e. fair liquidation value. Neither a trustee nor an equity receiver could, with the court's approval, sell for less." (Jt. App. 293a)

The Statutory District Court ultimately sustained the "bulk-sale discount" by stating:

> "* * * we can hardly find it irrational for the Commission to have concluded that it would be imprudent for the NH estate to take this risk [of market downturns] over a period of six years." (Jt. App. p. 418a)

The Commission expressed no such conclusions; no evidence was presented that there was such a risk of a real estate market decline that prudence required the New Haven Trustees to sell at a discount; the Commission is not qualified to rule on the legal question of the limits of prudence required of reorganization trustees; and the Reorganization Court, which is exclusively charged with the supervision of the Trustees, has ruled that it would be *imprudent* for the Trustees to sell to a middleman at a price below the fair market value.

In addition, as the Reorganization Court and Judge Weinfeld both recognized, discounts to account for marketing risks had already been deducted in arriving at liquidation value.*

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* The bondholders maintain that the $8,178,000 discount (331 I.C.C. at p. 662) charged against the real estate to accommodate the assumption of a six-year liquidation period was excessive, tantamount to an abandonment of the property and not supported by substantial evidence. The Bondholders Committee contends that the severity of the discount was made to force an equivalence between the liquidation value and the price Penn Central agreed to pay.

V

The Commission's valuation of the New Haven's Harlem River and Oak Point freight yards was arbitrary and capricious. The majority of the Statutory District Court erred in sustaining the Commission.

The New Haven owned approximately 160 acres of land in the Bronx, New York City, used for commercial warehousing, industry and railroad freight yards. In accepting a valuation of the Commission $4.6 million less than the evidence established, the majority of the Statutory District Court erred in considering that a reviewing court was precluded from correcting clear and substantial errors which resulted in gross unfairness by the substantial evidence rule. Judge Weinfeld, dissenting, stated that the Commission's findings was not "based upon substantial evidence" (Jt. App. p. 443a).

The Commission value assumed there would be no service to these properties in the event of a New Haven liquidation. The Reorganization Court, in recognizing a value $4.6 million more than the Commission, stated in respect of the Commission's reasoning:

> "The conclusions required to be reached for such a decision were not, however, supported by substantial evidence and cannot stand." (Jt. App. p. 296a)

The Reorganization Court characterized the principal Commission assumption as "absurd" (Jt. App. p. 297a).

The difference of $4.6 million in the holdings of the courts is substantial.

VI

The Commission was arbitrary and capricious in the computation of the discount of net liquidation proceeds to present value, in that it erroneously included $8,177,633 in gross receipts to be discounted and failed to eliminate $17,591,589 from gross receipts required by its treatment of the expenses of liquidation.

The Commission in the Remand Report again made major errors in the computation of the discount to present value of both the gross receipts in liquidation and the expenses of liquidation. Both the Statutory District Court and the Reorganization Court asked the Commission to recompute the discounts. The Commission by letter dated June 10, 1969 to the Reorganization Court made a recomputation to which the bondholders responded that the Commission's recomputation was not in accordance with the Reorganization Court's direction that the Commission file "a new formulation and computation of the discount for the present value of the New Haven's liquidation proceeds, in accordance with generally recognized accounting principles and based upon the changes made in valuation items through and including those stated in the present opinion" (Jt. App. p. 302a). The bondholders pointed out that the Commission included in gross receipts to be discounted $8,177,633 which the New Haven would never receive because this amount was written off the land values on the assumption of a six-year liquidation (331 I.C.C. at p. 662). In discounting the liquidation expenses however, the Commission failed to include the $8,177,633 as an expense of liquidation. The bondholders also pointed out the Commission's failure to correct the discount to present value by eliminating $17,591,589 from the gross receipts to take into account salvage costs of "other road property". These salvage costs had not been included in the list of liquidation expenses discounted by the Commission and it therefore

should not have included this amount as a part of the receipts to be discounted.

The Commission also made timing errors in reckoning the discounts, some in favor of Penn Central and some in favor of the New Haven.

The order of the Reorganization Court recognized that the correction of these errors required an increase in the price to be paid by Penn Central of $2,415,899.*

The bondholders called these errors and the Reorganization Court's order to the attention of the Statutory District Court. The majority of the Statutory District Court, in a memorandum accompanying its decree stated:

> "We have not passed on the merits of this contention since we do not consider it to be appropriately before us on settlement of the decree.. The difference in the treatment of this item by the two courts will be another matter for ultimate resolution by the Supreme Court." (Jt. App. p. 445a)

Had the Statutory District Court considered the matter and applied to the final price determined by the majority the basis for correction of the discount urged by the bondholders and accepted by the Reorganization Court, the correction would have amounted to $2,695,899 instead of $410,000.**

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* This figure includes a correction for errors conceded by the Commission in its June 10, 1969 letter.

** The difference between the correct discount in the Reorganization Court and the correct discount in the Statutory District Court results from the difference between the courts in their determinations in respect of the Harlem River and Oak Point freight yards.

VII

The Commission was arbitrary in limiting the amount of Penn Central's contribution to the New Haven losses and in failing to require Penn Central to bear all of the operating losses, properly defined, incurred between the date of the Penn Central merger and the transfer of the properties.

The New Haven suffered operating losses between the date of the Penn Central merger (February 1, 1968) and the date of the transfer of the New Haven properties to Penn Central (December 31, 1968) in the amount of approximately $11 million.

The Commission had, in the Inclusion Report, provided that Penn Central should contribute to the New Haven losses after the Penn Central merger by a formula which purported to require Penn Central to pay a maximum of $5.5 million of the operating losses (an amount estimated by the Commission to be equal to all the anticipated losses) incurring in the first year following the Penn Central merger and a declining percentage of the losses in the next two years (331 I.C.C. at pp. 718a-719a). Both the Reorganization Court and the Statutory District Court condemned the proposal of the Commission that Penn Central's contribution substantially decline in the second and third years on the grounds urged by the bondholders; *i.e.* that the downward progression constituted an *in terrorem* provision, designed to prevent the bondholders from seeking correction of the Commission's errors. The Statutory District Cout stated:

> "The Commission should not have assumed that the bondholders' attacks would necessarily lack merit; indeed this opinion shows the contrary. Moreover Penn Central has as much opportunity as the bondholders to prolong litigation. Since the Commission expressly placed the downward slide on this basis, the formula

> cannot stand, see Justice Douglas' dissent in the Penn-Central Cases, 389 U.S. at 557-558 * * *" (289 F.Supp. at p. 444)

The Statutory District Court, however, did not require Penn Central to pay all the post-merger operating losses. Judge Weinfeld dissented and stated:

> "Had that which should have been done, been done at the time of the merger, New Haven then would have become a unit of Penn Central, with the latter necessarily absorbing operating losses from the date of the merger; to require Penn Central to do so now imposes no unjust or onerous terms upon it. Penn Central, as the beneficiary of the merger, would be assuming a burden which was part of a single transaction * * *" (289 F.Supp. at p. 418).

On remand the Commission recognized that the New Haven's condition had so worsened since the Inclusion Report that the $5 million eleven month maximum contribution to losses was substantially less than the New Haven's actual loss (334 I.C.C. at pp. 71-74). Whereas the Inclusion Report showed that the Commission recognized fairness required that the New Haven be relieved of substantially all the operating losses for the first year following the merger, the Remand Report, by woodenly holding to the $5 million maximum contribution in the face of the fact that the losses exceeded $11 million, demonstrated that in its concern to preserve the lowest price to Penn Central, the Commission was prepared to ignore considerations of fairness to New Haven. Its refusal to increase the maximum share of Penn Central arbitrarily increased the share of the losses the New Haven must bear by $6 million. The Commission offered no basis for its arbitrary imposition of losses upon the New Haven whose continuing and increasing deficits resulted from the Commission's and the Reorganization Court's determination to keep the New Haven in operation until the transfer of its properties to

Penn Central. The Reorganization Court, however, had already, in July, 1967, recommended that an interim lease be provided by the Commission. (See 389 U.S. at pp. 508-9).

The Commission's persistence in keeping $5.5 million per year as the maximum Penn Central contribution to the New Haven losses has worked the same result as the earlier *in terrorem* formula intended. The bondholders' successful appeal from the Inclusion Report shifted the major portion of the New Haven operating losses to the bondholders, a result which the bondholders could only have escaped by submitting to the Commission's errors.

In full briefs it will be shown that the Commission was arbitrary in fixing a price which did not provide compensation for the losses which accrued prior to the Penn Central merger. These losses resulted directly from the Commission's and the Reorganization Court's requirement that the New Haven provide uninterrupted service in the public interest until Penn Central was obliged by the Commission, and by the act of merger obliged itself, to assume the New Haven operations. In the circumstances this imposition of losses constituted a taking of the bondholders' property without compensation.

VIII

The Statutory District Court erred in sustaining the Commission's order requiring the transfer to Penn Central of non-operating property without the payment of any consideration for such transfer.

The New Haven was, prior to December 31, 1968, the owner of 91,344 shares of the common stock of Railway Express Agency, Inc. (REA). On the books of REA, the shares had an equity of $766,155. Because of the absence of a ready market for these shares and uncertainties cre-

ated by litigation and recent legislation, a witness testified that the shares had no market value in an assumed liquidation.* The Commission, without comment, attributed *no value* at all to the shares (331 I.C.C. at p. 678), *but nevertheless required their transfer to Penn Central.*

The New Haven also was the owner of 15,000 shares (50%) of the common stock of New York Connecting Railroad Company. Although the shares had a book value of $1,117,415, the Commission attributed *no value* at all to the shares *but nevertheless required their transfer to Penn Central* (331 I.C.C. at p. 678).

The REA shares and the New York Connecting Railroad shares are not operating properties and their transfer without consideration is unnecessary to Penn Central's assumption of New Haven railroad operations. The transfer of these shares to Penn Central without attribution of value unconstitutionally deprives the bondholders of their property and provides a windfall to Penn Central. Neither the Commission nor any party to these proceedings** has suggested any justification for a transfer of these nonoperating assets without consideration and there is no need for their transfer at all. Since the Commission is unable to determine the market value of these securities, they must be retained by the New Haven estate. If the Commission were correct in holding that these investments are valueless, the retention by the New Haven would cost Penn Central nothing.

Both REA and New York Connecting Railroad continue to exist and continue to conduct business. Even if there

* This was despite the fact that at the time of the testimony, an offer of $20 per share was outstanding. See *Denver & Rio Grande R.R. Co.* v. *United States,* 387 U. S. 485 (1967). At that price, the shares would be worth $182,688.

** Although the issue had been raised in briefs to the Courts, neither Court has specifically commented on the question.

were no bidders for these shares in liquidation sales as of December 31, 1966, it is clearly incorrect to assume that a reorganization court or equity receiver could permit the shares to be given away or abandoned. They could be distributed to the creditors or, in the case of the New Haven, retained by the reorganized company.

As a result of the reorganization of the Boston & Providence Railroad (B & P),* the New Haven will receive Certificates of Contingent Beneficial Interest (CCBI) in exchange for New Haven claims and securities. The Commission valued the CCBIs at $1.5 million (334 I.C.C. at pp. 50-52). The Statutory District Court held that the CCBI's had no value, yet required their transfer to Penn Central. The forced transfer of these securities without consideration deprives the New Haven of its property without just compensation. Ascribing no value to the CCBIs is arbitrary and erroneous.

CONCLUSION

This Court has jurisdiction of this appeal. The questions presented are substantial.

Respectfully submitted,

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December 5, 1969

* *In re Boston & Providence R.R. Corp.*, 260 F.Supp. 415 (D. Mass. 1966), *cert. denied*, 389 U. S. 974 (1967).

APPENDIX

Statutes Involved

Administrative Procedure Act

Section 10(a), 5 U.S.C. § 702.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Section 10(c), 5 U.S.C. § 704.

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Section 10(e), 5 U.S.C. § 706.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Bankruptcy Act

§77(g), (o), 11 U.S.C. §205(g), (o)

(g) If in the light of all the existing circumstances there is undue delay in a reasonably expeditious reorganization of the debtor, the judge, in his discretion, shall, on motion of any party in interest or on his own motion, after hearing and after consideration of the recommendation of the Commission, dismiss the proceedings. Upon the filing of such an order of dismissal, all right, title, or interest of the trustee or trustees shall vest by operation of law in the debtor unless otherwise provided by such order.

(o) The trustee or trustees, from time to time, shall determine what lines or portions of lines of railroad and what other property of the debtor, if any, should be abandoned or sold during the pendency of the proceedings in the interest of the debtor's estate and of ultimate reorganization but without unduly or adversely affecting the public interest, and shall present to the judge petitions, in which other parties in interest may join, for authority to abandon or to sell any such property; and upon order of the judge made after a hearing pursuant to such reasonable notice by publication or otherwise as the judge may direct to parties in interest, authorizing any such abandonment or sale, but only with the approval and authorization of the Commission when required by the Interstate Commerce Act as amended February 28, 1920, or as it may be hereafter amended, the trustee or trustees shall take all steps and carry out all proceedings necessary for the consummation of any such abandonment or sale in accordance with the order of the judge. Any such order of the judge shall be a final order for the purposes of appeal. The judge may order and decree any sale of property, whether or not incident to an abandonment, under this subsection at public or private sale and subject to or free from liens. The proceeds derived from any such sales shall be received by the trustee or trustees subject, in case the property was sold free from lien, to any liens thereon at the time of sale, and shall be applied or disposed of in such manner as the judge by further order shall direct. The expense of such sale shall be borne in such manner as the judge may determine to be equitable. The judge may order the trustee or trustees of the debtor to deposit such proceeds with any mortgage trustee entitled thereto, to be applied in payment of all or part of such mortgage.